

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA
AT
MONROE,
IN
JUNE, 1883.

JUDGES OF THE COURT:

Hon. EDWARD BERMUDEZ, <i>Chief Justice.</i>		
Hon. FÉLIX P. POCHÉ,	}	<i>Associate Justices.</i>
Hon. ROBERT B. TODD,		
Hon. CHARLES E. FENNER,		
Hon. THOMAS C. MANNING,*		

No. 1078.

THE STATE OF LOUISIANA VS. WILLIAM TAYLOR.

An indictment charging that the accused with a dangerous weapon did *make an assault* upon the person of A, and did feloniously inflict a wound less than mayhem, is evidently framed under Sec. 974 of the R. S.

It is not amenable to the charge of duplicity, for containing the words: "*did make an assault*," found in the preceding Section 973.

Assault is an essential element or ingredient of the offense charged. There can be no battery, no murder, no rape, no wounding, unless an assault be first committed.

The use of the words did not change the nature of the offense charged, and was legitimate and authorized.

A PPEAL from the Fifth District Court, Parish of Ouachita. *Richardson, J.*

F. G. Hudson, District Attorney, for the State, Appellee.

J. H. Dinkgrave for Defendant and Appellant.

The opinion of the Court was delivered by
BERMUDEZ, C. J. The indictment charges that the defendant with

Mr. Justice MANNING was absent during the whole of this term.

a dangerous weapon, to-wit: a pistol, feloniously did make an assault upon the person of Orange Chappel, and did feloniously inflict a wound less than mayhem.

After trial, the jury rendered a verdict of guilty as charged.

The accused then moved to arrest the judgment, on the main ground that the indictment is fatally defective for charging two distinct offenses in one single count.

The motion having been overruled, and the prisoner sentenced to twelve months' imprisonment, we are called upon to review the ruling denying the motion in arrest.

The complaint is, that the indictment contains two distinct charges in a single count.

In support it is claimed that the offenses charged are totally distinct and separate, the penalties therefor being entirely different and inconsistent; that the penalty of the first offense is discretionary: fine or imprisonment, or both; that the punishment for the other is mandatory and absolute.

It is further insisted that the grand jury should have found upon both offenses, and that the indictment should show that fact; that failing in this, the indictment is fatally defective, and that the prisoner should be released.

To sustain his position, counsel for defendant refers to Sections 793 and 794 of the Revised Statutes, and to a number of authorities, to show that the indictment contains two distinct charges in one count, and that this is prohibited.

There can be no doubt that the two Sections, to which reference is made, provide for different offenses and for different penalties; and that the authorities are: that distinct offenses, created by different statutes, punishable in different ways, cannot be included in the same count. 4 An. 32; 6 An. 289; 15 An. 498; 20 An. 145; 31 An. 718; 33 An. 1294.

The prosecution is evidently brought under Section 794 of the R. S. The indictment is couched in the very terms of the Statute, which provides: "whoever shall, with a dangerous weapon, inflict a wound less than mayhem upon another person, shall on conviction, etc."

There is no substantial difference between the indictment and the Statute, no material variation from its requirements. The disparity between the phraseology is nominal. It consists merely in this: that the indictment charges that the defendant did *make an assault*; but the indictment charges distinctly, that the defendant did feloniously inflict a wound less than mayhem.

The words: *did make an assault* are stereotyped in prosecutions like

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this, and were properly inserted. It is obvious that an assault is essentially an element or ingredient of the offense charged. There can be no battery, no murder, no rape, no wounding, unless an assault be first committed. The insertion of the words did not change the nature of the offense charged, and was therefore legitimate and authorized.

The indictment is not consequently open to a successful charge of duplicity.

This view of the case renders unnecessary a decision of the other ground of complaint.

Judgment affirmed.

No. 1074.

D. C. BROWN VS. E. M. RAGLAND.

A judgment rendered by a Circuit Court of Appeals in a case within its jurisdiction is final and cannot be reviewed by the Supreme Court.

Hence, in such a case, this Court will not interfere with the proceedings of the Circuit Court, when, in an appeal pending before it, the papers are destroyed by fire, and the Court sets aside the judgment appealed from and remands the cause to the District Court to be tried *de novo*, with the view to reinstate the pleadings, the evidence, and other papers in the case.

The Supreme Court will decline to pass on the correctness of such a ruling.

APPPLICATION for Writs of Prohibition and Mandamus against the Judges of the Second Circuit Court of Appeals.

Ray & Morgan for the Relator.

T. O. Benton for Respondents.

The opinion of the Court was delivered by

POCHÉ, J. The facts and proceedings which underlie relator's application are as follows:

A devolutive appeal taken from a judgment of the District Court in favor of the defendant Ragland, who is the relator herein, was pending before the Circuit Court of the proper circuit, when the fire, which destroyed the Courthouse of the Parish of Ouachita, in Monroe, on the 19th of November, 1882, also destroyed all the papers pertaining to this case.

On motion of appellant's counsel, and on his showing the impossibility of otherwise procuring the oral testimony on which the case mainly turned, and with a view to the reinstatement of the cause, the Circuit Court set aside the judgment appealed from, and remanded the cause to the District Court, to be there tried *de novo*.

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Relator's complaint is, in substance, that in granting this order the Circuit Judges exceeded the bounds of their jurisdiction, transcended their authority and acted without the sanction of any law in the premises, and thus caused him irreparable injury. Hence, he prays for an order prohibiting them from proceeding further in the enforcement of their decree, and he further prays for an order compelling them "to take jurisdiction and pass on the appeal before them, when appellant shall bring up the record in this case, properly supplied according to law."

Under the plain text of the Constitution, our only right of interference with the Circuit Courts of Appeals rests on our supervisory jurisdiction, as conferred by Article 90 of the Constitution.

It is therefore clear that a cause which falls under their appellate jurisdiction cannot be reviewed on appeal by us. Hence it is that we have uniformly held that, in an application for a writ of prohibition, the only subject of inquiry is confined to the question of jurisdiction *vel non* of the court complained of.

Now, in this case, relator concedes, and all his proceedings show most conclusively, that the Circuit Court was legally and constitutionally vested with absolute jurisdiction over the appeal taken in the case. His prayer for a mandamus to compel the Circuit Court to take jurisdiction of the appeal, and to pass upon it, is an unmistakable admission in that sense.

Hence his complaint, although charging in terms usurpation of jurisdiction on the part of the Circuit Court, is in truth and in fact nothing but a charge that the Circuit Judges have ruled erroneously and contrary to law.

Conceding *arguendo* that their order is a flagrant violation of law, an outrageous usurpation of authority, and works an irreparable injury to this relator, we are still met with the proposition that the judgment was rendered in the exercise of their uncontested appellate jurisdiction, and is therefore final.

An attempt on our part to review their ruling, under an application for prohibition, would involve us in an attempt to assume appellate jurisdiction over that tribunal, a jurisdiction which is not conferred to us, and which we must decline to assume.

"To hold otherwise would enlarge the jurisdiction of this Court so as to embrace every conceivable suit before every Court and nullify practically the article of the Constitution which defines our jurisdiction." *State ex rel. Kramer vs. Judge*, 32 An. 219.

To the complaint that the Circuit Judges had no transcript, record or papers of any kind before them, so as to admit of a review of the

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judgment appealed from, and that therefore their reversal of the judgment was unwarranted by law, and was an usurpation of authority, our established jurisprudence answers, that having jurisdiction of the cause on appeal, the Circuit Judges had the exclusive power of disposing of the case as they deemed proper and just.

They are the sole judges of the sufficiency and validity of the records which are brought before them, and we are powerless to control them in this or any other particular which is entrusted, by the Constitution and by law, to their judicial discretion.

The powers vested in this Court under its supervisory jurisdiction are of a very delicate nature; and we have repeatedly held that we could not and would not exercise them so as to infringe upon the independence of inferior courts in the legitimate exercise of their jurisdiction. *State ex rel. New Orleans vs. Judge*, 32 An. 549; *State ex rel. Sinnoto vs. Falls*, 32 An. 553; *State ex rel. Wing vs. Judge*, 32 An. 1222; *State ex rel. Valence vs. Judge*, 33 An. 256; *State ex rel. Marky vs. Judge*, 33 An. 378.

In the case of *State ex rel. Berthoud vs. Judge*, 34 An. 782, we were asked to prohibit the lower court from enforcing a judgment alleged to have been rendered on an issue, in disregard and wanton violation of a prohibitory law, but finding that the Court had jurisdiction of the cause, and that it had exercised it, we refused to interfere with the judgment thus rendered on the merits of the cause. Speaking of the judgment complained of we said: "It may well be that this judgment is in flagrant violation of law, will work irreparable injury and visit a great hardship on the corporation affected by it, but under our well defined jurisdiction we are powerless to relieve the relator, and have no more authority to reverse that judgment than any other judgment in an unappealable case falling, as this case undoubtedly does, within the jurisdiction of the court which rendered the judgment." This reasoning applies with irresistible force to the judgment complained of in this case, which was rendered by a court of appellate jurisdiction, whose judgment in proper cases cannot be reviewed by any other court in this State. The relator is clearly not entitled to a prohibition, and still less entitled to a mandamus, the object of which would be to compel the respondents to take jurisdiction of a cause in the face of a showing made by relator himself, that the court has exercised jurisdiction and disposed of the cause. We can but repeat that such disposition, whether right or wrong, is not within the scope of our jurisdiction.

On this branch of the pleadings the case is literally covered by our decision in the case of the *State ex rel. Gilmer vs. Judges Circuit Court*,

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33 An. 1201. In that case the Circuit Court had remanded to the District Court for trial *de novo*, a case in which judgment had been rendered by the late Parish Court of Caddo, and the relator charging the nullity of such an order applied to us for a mandamus to compel the Circuit Court to try the appeal as it was originally presented from the Parish Court. In refusing the writ prayed for, we said: "The act of the Judges of the Court of Appeals, in remanding the case to the Circuit Court for trial, was a recognition of the appeal as before them, and a judicial act showing an exercise of their jurisdiction of the case. * * The Judges may have committed an error in remanding the case, and perhaps should have tried the appeal as it came from the Parish Court, but any error committed by the Court of Appeals in a matter within its discretion and jurisdiction we cannot review, having no appellate jurisdiction of the proceedings of that court."

The rules which we have established in that and numerous other cases are conservative, wise and sound; and we see no features in this case which would entitle it to be treated as an exception, or justify us to depart from our previous conclusions on this part of our jurisdiction.

These considerations dispose alike of the writ of prohibition applied for herein against the District Judge, in order to restrain him from obeying the mandate of the Court of Appeals.

The writs applied for are therefore refused at relator's costs.

No. 1087.

MRS. E. A. STERLING VS. THE HEIRS OF JOHN F. STERLING.
COBB & GUNBY, INTERVENORS.

Where an appellant fails to file the transcript on the return day, or within the legal delays thereafter, and his appeal is dismissed because such failure is imputed to his fault, he cannot renew his appeal thereafter.

The failure to seasonably file the record, without legal excuse, is considered as an abandonment of the appeal.

APPPEAL from the Fifth District Court, Parish of Ouachita. *Richardson, J.*

D. C. Morgan for Intervenor and Appellants.

F. P. Stubbs for Defendant and Appellee.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

TODD, J. This motion is to the following effect: that an appeal was taken to this Court returnable on the 2d Monday of June, 1882; that

the transcript was not filed on said return day, or within the legal delays thereafter, owing to the laches of the appellants, and that said appeal was on motion dismissed by decree rendered at said previous term of this Court, and that appellants could not take and prosecute another appeal, the present one.

By reference to the minutes of the proceedings of this Court at its last term at this place, it appears that the 2d Monday of the term fell on the 12th of June, which was the return day for appeals from the Parish of Ouachita, but that the transcript was not filed till the 17th of the month. It was held in the opinion dismissing the appeal, that the failure to file the transcript in time was attributable to the fault of the appellants, and for this reason the appeal was dismissed.

We have carefully and anxiously reviewed the decisions bearing on the question, to ascertain if we could find any ground upon which this appeal could be maintained against the adverse motion.

We had occasion to examine the jurisprudence on the subject in a late case, that of *Pierce vs. Cushing*, 33 An. 810, a case almost exactly parallel to the instant one. There were two successive appeals in that case. The first filed after the return day and dismissed. The motion to dismiss the second appeal was, in substance :

“That the first appeal having been dismissed, for failure to file the transcript in time, the appellants had no right in law to renew appeal; that the first appeal was abandoned and could not be renewed.”

In that case, as in this, it was urged, that where an appeal is dismissed on the motion of the appellee, the appellant can take another appeal within the year allowed for a devolutive appeal.

If the question were a new one, we would hesitate about dismissing an appeal, because of what is termed in the decisions a constructive abandonment of the appeal, but the question is not a new one, and our decision in the case of *Pierce vs. Cushing* was based on a long line of precedents, referred to in the opinion therein delivered.

Among the cases cited was that of *Ducournau vs. Levistones*, 4 An. 30, in which this language is used by the Court :

“The Code of Practice is positive that if the appellant does not file the transcript seasonably, the appeal shall be considered as abandoned, and the appellant shall not be afterwards allowed to renew it.”

And in *Brickell vs. Conner*, 10 An. 235, it was held :

“That a party who obtains an order for a devolutive appeal, and fails to furnish bond, as required, and to file the transcript in appellate court during the term at which the appeal was returnable, will be

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held to have abandoned his appeal and will not be allowed to renew it." And again, in the case of *Redmond vs. Mann*, 29 An. 149, it was said:

"If a suspensive appeal has been dismissed because the appellant has failed to file the record within three judicial days after the return day, he cannot afterwards be allowed to take a devolutive appeal from the same judgment." See also, 9 An. 39; 15 An. 592.

We have attentively examined the decisions referred to by the appellants' counsel, and find none of them to militate against the authority of the ones which we have cited above and on which our action in the case of *Pierce vs. Cushing* was predicated. They all, with one exception, refer to cases where the first appeal was dismissed for defects in the appeal bond, and would, therefore, come under our ruling in the case of *York vs. Hoover*, recently decided by this Court, and not reported, that an appellant was debarred from a second appeal when the first appeal was seasonably filed, but was dismissed for defects in the transcript.

For these reasons the motion must prevail, and the appeal is, therefore, dismissed at the cost of the appellants.

No. 1080.

THE STATE OF LOUISIANA VS. JAMES JOHNSON ET AL.

Indictment concluding with the words "against the peace and dignity of the State," complies with requirement of Art. 86 of the Constitution.

As to distinction between day and night, time is of essence of the crime of burglary, but not as to date of week, month or year; and the court did not err in allowing amendment of indictment as to such date, under § 1047, Rev. Stat.

Although a confession made by one of two joint defendants might not be admissible as a confession against the other until proof of conspiracy, yet when made in the other's presence and implicating him and not denied by him, it may go in as a tacit admission by the latter, in absence of objection on the ground that he was under arrest on the charge at the time, and, therefore, had the right to be silent.

Proof by a witness, of subsequent statements made to him by the co-defendant, is hearsay and properly excluded.

A PPEAL from the Twelfth District Court, Parish of Grant. *Barbin, J.*

J. C. Egan, Attorney General, for the State, Appellee:

1. Robbery is not prescribed by one year. R. S. § 2814.
2. The terms "against the peace and dignity of the State" and "against the peace and dignity of the same," in an indictment, are equivalents, and may be used indiscriminately.
3. A confession of a co-defendant may be used in evidence against both the accused, when evidence has gone to the jury that they had acted, in the perpetration of the crime, together.

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4. The indictment may be amended as to time, when there is a variance between the time laid and that proved, when time is not of the essence of the offence. R. S. 1047.
5. Hearsay evidence is admissible.

Thorpe, Peterman & Thorpe for Defendant and Appellant :

1. All criminal prosecutions must conclude in the words: "against the peace and dignity of the same." Art. 86, Constitution of Louisiana.
2. The confession of one of two accused persons is not admissible in evidence against the other. 26 An. 513; 29 An. 354; 30 An. 919.
3. Where time is of the essence of the offence charged, an amendment to an indictment changing the date of the commission of the crime alleged therein, cannot be made after a jury has been empanelled and testimony has been taken. Secs. 1047, 1063, Revised Statutes.
4. Evidence offered on the part of the defence to prove that a confession which the witnesses for the prosecution had testified was voluntary, was made under duress and extorted by violence, is admissible.

The opinion of the Court was delivered by

FENNER, J. James Johnson and Richmond Harris were jointly indicted for burglary. Johnson escaped. Harris was tried alone and was convicted of larceny, from which conviction he appeals.

1. It is difficult to treat seriously the earnest argument in support of the motion to quash the indictment, on the ground that it concludes with the words "against the peace and dignity of *the State*," instead of those "against the peace and dignity of *the same*," used in Art. 86 of the Constitution. Obviously, the antecedent to which the words "the same," as employed in the Constitution, refer, is *the State*, and those words were there used simply to avoid tautology. The most exacting precision should be satisfied when, even at the sacrifice of euphony and rhetorical rules, the violation of the peace and dignity of the State is asserted in express terms, rather than by mere reference. If courts should tolerate such verbal objections, the criminal pleader might exclaim with the Melancholy Dane, "we must speak by the card, or, by 'r lady, equivocation will undo us!"

2. An exception is presented to the ruling of the Court permitting the State to amend the indictment so as to show that the offense was committed on a different date from that stated in the indictment. We think the allowance of such an amendment clearly lay within the discretion of the court under Art. 1047, Revised Statutes. As to the distinction between day and night, time is of the essence of the crime of burglary, but not as to the date of the week, month or year.

3. Another exception appears to the admission of the testimony of one Collins, offered to prove that Johnson had voluntarily confessed to him that he and Harris had jointly committed the crime. The objection was on the ground that there was no evidence of conspiracy,

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and that, therefore, the confession was admissible only against the party who made it. Regarded as a confession simply, there might be force in this objection, but the Judge, in his reasons for overruling it, states that Harris was present when the statement of Johnson was made, and made no denial thereof. This brings the case within the rule of tacit admissions. It does not clearly appear that Harris was under arrest or in custody under the criminal charge at the time, nor was any objection on that ground urged. The case is not, therefore, within the rule of Diskin's case, 34 An. 919.

4. The last bill of exceptions was taken to the exclusion of testimony of a witness offered by defendant to prove subsequent declarations of Johnson, to the effect that his former confession was not voluntary, but extorted by duress and violence.

Direct evidence to show circumstances of duress and violence under which Johnson's statement and Harris' failure to deny had taken place, would have been undoubtedly admissible. But it seems clear that the mere subsequent statements of Johnson as to those circumstances, not made under oath and sought to be proved by a third person, were hearsay and inadmissible under any theory.

Judgment affirmed.

No. 1083.

THE STATE OF LOUISIANA VS. DAN SULLIVAN.

An indictment for forgery containing the purport or tenor of the instrument said to have been forged, and setting forth the words of such instrument, can be legally amended during the trial, by substituting the word *oblige* to the word *charge* at the conclusion thereof.

The variance was not material and could not prejudice the defense.

The correction was trivial and left the sound and sense substantially the same.

A PPEAL from the Fifth District Court, Parish of Ouachita. *Richardson, J.*

F. G. Hudson, District Attorney, for the State, Appellee.

W. F. Millsaps for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, J. The defendant was indicted for forgery, tried and convicted. From the verdict and judgment sentencing him to two years at hard labor, he appeals to this Court.

The record contains one bill of exception only. It was taken to the ruling of the District Judge, permitting the State's attorney to correct the indictment so as to make it conform with the proof. The correct-

tion consisted in substituting the word "*oblige*" to the word "*charge*," contained in the indictment.

Section 1047, Revised Statutes, is to the effect that, whenever on the trial of any indictment for any crime or misdemeanor there shall appear to be a variance between the statement in the indictment and the evidence offered in proof thereof, * * in the name or description of any matter or *thing* whatsoever therein named or described, * * it shall be lawful for the Court, * * if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defense, to order such indictment to be amended according to the proof, etc.

Section 1049, R. S., is to the further effect that, in any indictment for forging * * any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known or by the purport thereof, without setting out any copy or *fac-simile* thereof, or otherwise describing the same, or the value thereof.

The indictment in this case describes the instrument charged to have been forged as a "certain order for money," and terminates with its concluding words: "*and charge Bell Teen.*"

The tenor of the order having been set out in the indictment, an insignificant variance between the charge and the proof could well be corrected, so as to have the former to conform with the latter. The variance was not material. The correction was trifling. It was merely literal, and left the sound and sense substantially the same.

In the exercise of the discretion formally vested in him by the special legislation stated, the District Judge thus viewed the variance, and considering that the accused could not thereby be prejudiced in his defense, he permitted the amendment.

The defendant did not plead surprise or probable injury at the time the amendment was made; neither did he do so in his motion for a new trial, which merely charges, "that the verdict is contrary to the law and to the evidence." He has not undertaken in this Court to show how the variance was material and how the defendant was prejudiced by the amendment.

The authorities invoked in his behalf would be entitled to weight had not the amendment been made, but they can receive no application, as the error, trivial after all, was rectified in his presence during the trial.

The District Judge did not err in directing the amendment. *Waterman U. S. Cr. Dig.*, pp. 213, 214, Secs. 198, 207; 100 *Mass. 12*, *Commonwealth vs. Butterick*.

Judgment affirmed.

 Allen, West & Bush vs. Whetstone et al.

No. 1082.

ALLEN, WEST & BUSH VS. MRS. MARY E. WHETSTONE ET AL.

The fact that a party to the suit requests it, does not deprive the court of the power to order *ex officio* a judicial sequestration without affidavit or bond.

A commercial partnership may hold title, in its firm name, to real estate, when acquired by consent of the parties, who thereby became joint owners thereof.

Registry of act of sale under private signatures is binding as notice to third persons, though without proof of signatures, as directed by Rev. C. C. 2253.

A party to a written contract cannot avail himself of error resulting from failure to read the same before signing, where not induced to do so by the other party thereto.

A cotton factor who, by direction of his customer, invests the latter's funds, is not responsible to him for illegality of the investment.

A PPEAL from the Sixth District Court, Parish of Morehouse. *Brigham, J.*

Ellis & Sugar for Plaintiffs and Appellees:

1. It is not necessary that the vendee sign the deed. C. C. 1811; 4 An. 162; 23 An. 272.
 2. A deed under private signature duly recorded without the affidavit of the subscribing witnesses, gives notice to third persons. Art. C. C. 2253 is merely directory. 9 An. 547; 10 An. 502; 11 An. 531; 25 An. 111.
 3. Contracts are binding, though the contracting parties signed the same without reading it. 22 An. 14; 30 An. 1157.
 4. One pleading error or fraud must show, by evidence, in what the error consisted or how the fraud was practiced. 11 L. 80; 7 R. 418; 6 N. S. 207.
 5. The principal is bound by the acts of the agent. C. C. 3001; 4 L. 66.
 6. When the agent exceeds the scope of his authority, it is the duty of the principal to give notice. 11 L. 288; 2 R. 1; 6 R. 284, 684; 12 An. 159; 20 An. 215; 18 An. 546; 29 An. 679; 24 An. 462.
 7. An agent's neglect to notify his principal does not affect the latter's obligations to third persons. 4 N. S. 303; C. C. 3021.
 8. A principal cannot plead ignorance of the acts of his agent, nor a partner ignorance of the acts of his co-partner, nor of his business managers, when acting within the scope of his authority. 6 R. 97; 3 R. 256; 1 An. 432; 5 An. 532.
 9. When a person contributed to his own loss by holding out to the world some one as agent, such person is bound by the acts of such agent. 4 An. 19; 9 R. 346; 6 L. 47.
 10. The possession of the lessee is the lessor's possession. C. C. 3433; 6 R. 189; 16 L. 29.
 11. What has been given or paid on a moral obligation arising from an aleatory contract, cannot be recovered. When such contracts are executed, neither party can plead their turpitude to rescind them. C. C. 2984; 1 An. 176.
- The purchase of cotton for future delivery is not an illegal contract, and the requiring of margins is in the nature of a penal obligation and does not vitiate the contract. C. C. 2117, 2122, 2125, 2485, 2186; Pothier, pp. 59, 60; 23 An. 731, *et seq.*, Aroni.
12. In a contest between a vendor and vendee as to ownership of property which had been sold with right of redemption, the plea by the vendor that in a subsequent settlement he had paid the vendee all that was due him, and extinguished whatever right or claim the vendee had on the property, is virtually a plea of payment. H. D. p. 1141, No. 1 and authorities cited; Louque p. 535, Nos. 1 and 2 and authorities there cited.
 13. In an action of slander of title, defendant by setting up title in himself shifts the burden of proof and must stand on the strength of his own title, and not on the weakness of his adversary's. 33 An. 249.

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Todd & Todd on the same side :

In a suit for slander of title, if defendant sets up title in himself, the action is changed into a petitory one, in which the defendant stands as plaintiff. 33 An. 249, *Edward J. Gay vs. Thos. H. Ellis*.

The written acceptance of the vendee, in a sale of real estate, is not essential to perfect his title. 23 An. 272.

The recordation of a deed under private signature is good against third persons without the affidavit of the subscribing witnesses or either of them. 11 An. 533; 21 An. 241; 25 An. 111, and authorities therein.

Qui facit per alium facit per se. The acts of the agent cannot be disputed by the principal, and if ratified, when authority is exceeded, the principal is bound. C. C. 2985-94-95; 6 L. 589; 19 An. 370; 18 An. 546; 20 An. 215; 27 An. 76; 29 An. 679.

A principal who contributes to his own loss, by holding out to the world a careless and irresponsible person as agent, cannot recover such loss against innocent persons dealing with such agent. 4 An. 19; 6 L. 47; 9 R. 346.

One pleading error and fraud must show that it is superinduced by the other contracting party. 22 An. 14; C. C. 1818-19-20; 30 An. 1157.

If the agent deceives his principal, and exceeds the scope of his authority, it is the duty of the principal, as soon as he discovers this, to notify the other party. 6 R. 684; 11 L. 288; 12 An. 159; 22 An. 496; 24 An. 462.

One cannot be heard in a suit to recover what has been paid on an illegal or immoral contract. O. C. C. 2953.

A contract for the purchase or sale of cotton, on future delivery, is not illegal or immoral. 28 An. 731, Decision of U. S. Supreme Court in the case of *Smith & Lightnor vs. John H. Roundtree*, decided April 16, 1883. See also *Aroni on Cotton Futures*, pp. 11, 12, 34. The plea of payment waives the general issue, and the party pleading it is confined to this issue in his defence.

Newton & Hall for Defendants and Appellants:

A judicial sequestration sued out at the request of a party to the suit must be preceded by affidavit and bond. C. P. 273-5-6; 16 An. 335.

A commercial partnership cannot own immovable property. C. C. 2825; 23 An. 419; *Louque's* Dig. p. 511.

Consent is essential to every contract. C. C. 1797, 1819.

Error of fact will avoid a contract. C. C. 1819, 1821.

Contract, without a consideration, can have no effect. C. C. 1893, 1896.

A commercial partnership cannot exist between husband and wife. 19 An. 249; 2 La. 269, 270.

The record of an act under private signature can have no effect against a *bona fide* purchaser, unless previous to its recordation it is acknowledged by the party or proved by the oath of one of the subscribing witnesses, and the certificate of such acknowledgment by the Recorder, etc. C. C. 2252; 28 An. 726; 33 An. 1250.

A party cannot sue for ownership of property, and in same suit claim damages for slander of title of said property. 12 An. 873.

A contract for purchase and sale of cotton futures is aleatory in its nature and cannot be enforced. C. C. 2982.

The opinion of the Court was delivered by

FENNER, J. A careful consideration of the evidence leads us to the following conclusions as to the facts:

Mrs. Mary E. Whetstone recovered a judgment of separation of

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property against her husband in 1875. Immediately thereafter she executed in favor of her husband, Robert Whetstone, a power of attorney, general, special, of the broadest character, embracing powers to receive her moneys and property, to collect and compromise claims, to buy, sell, transfer and assign any and all property belonging to her, to make all contracts pertaining to any and all matters in which she may be interested, to sign for her notes, drafts and all other instruments of writings, etc. It is difficult to conceive of any power possessed by Mrs. Whetstone which might not have been executed in her behalf by her husband.

Mrs. Whetstone then established herself in business as a public merchant, which business was managed by her husband, under the power referred to, and was conducted in the name of Robert Whetstone, agent, or later in the name of Whetstone & Co.

The business was not prosperous, and by the year 1881 had become embarrassed and insolvent. As a desperate expedient, Whetstone applied to Allen, West & Bush, the cotton factors and heavy creditors of Whetstone & Co., to buy for that concern some cotton futures. Plaintiffs replied, refusing to do so, unless secured for necessary margins. Whetstone responded, that if plaintiffs would execute his order, he would sell to them certain storehouses belonging to his wife, title to be held as security against loss. Plaintiffs accepted the proposition, and made the investment for Whetstone & Co. Thereupon, Mrs. Whetstone, aided and authorized by her husband, executed an act of sale of the storehouses to plaintiffs, for the expressed consideration of "\$2,500 cash, invested by Allen, West & Bush for the use and benefit of said Mrs. M. E. Whetstone," and upon the condition that if she should pay back the \$2,500 by the 1st day of June following, the sale would be null and void, otherwise to remain in full force and effect.

The firm of Whetstone & Co. was succeeded by Whetstone & Ellis, consisting of Mrs. Whetstone and Dr. Ellis; subsequently Dr. Ellis purchased the interest of Mrs. Whetstone, and the firm of Larkin & Ellis was formed, which, on February 3d, 1882, entered into a written agreement with plaintiffs to occupy the houses as their tenants for the remainder of the year, upon the consideration of acting as plaintiffs' agents in settling up their business on Oakridge.

On January 25th, 1882, the deed to plaintiffs was recorded.

After that time, Mrs. Whetstone and her husband conceived the idea of repudiating the transaction with plaintiffs, and to that end, they began to set up pretensions to the continued possession of the storehouses, and obtained from the tenants acknowledgment in writing of their holding under Mrs. Whetstone, directly in the teeth of their

prior contract with plaintiffs. Mrs. Whetstone then executed a deed of sale of the property to her mother, Mrs. E. G. Larkin, who continued thereafter to claim possession and ownership of the property, and procured similar acknowledgments of her possession from the tenants, and even entered into a conditional contract of lease with them for the year 1883.

On learning these facts, plaintiffs instituted the present action of slander of title against Mrs. Whetstone and Mrs. Larkin, the object of which is to quiet their title to, and possession of, the property.

Upon the suggestion of the collusive proceedings between their tenants and the defendants, threatening divestiture of their possession, the Judge granted an order of judicial sequestration of the property *pendente lite*.

The defendants allege substantially the nullity of plaintiffs' title to the property, and the validity of Mrs. Larkin's title, which latter they pray may be recognized, and that she be decreed the owner of the property.

We shall consider the various questions presented in the following order :

1. It is claimed that the judicial sequestration, without affidavit or bond, was wrongful, because issued "at the request of the parties." The fact that parties suggested or requested it did not deprive the court of the power to order the sequestration *ex-officio*, under C. P. 273, without affidavit or bond.

2. Exception is taken to the capacity of Allen, West & Bush to stand in judgment, because it is a commercial firm and incapable, as such, of owning real estate. The exception is frivolous. The restrictions as to the dealing in immovable property by commercial partnerships are limitations upon the powers and rights of partners in reference thereto. A commercial partner has no authority to bind his co-partners without their consent, by purchases or sales of immovables in the name of the firm. But such transactions are perfectly valid when made with the consent of or approved by the co-partners, who, under such circumstances, become joint owners. In the present suit not only the firm, but all the members thereof are parties, and their right to stand in judgment does not admit of question.

3. It is urged that plaintiffs' title is without effect as against Mrs. Larkin, because being a sale by private act it was not acknowledged or proved prior to recordation, in accordance with Article 2253, Rev. Civil Code.

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It was not supposed that this question would again be agitated, after the exhaustive consideration and disposition given to it in *Stallcup vs. Pyron*, 33 An. 1249.

4. Nullity of the deed to plaintiffs is urged, because it was not accepted in writing by the latter.

It is well settled that written acceptance is not necessary, but may be established by acts clearly indicating acceptance. *Balch vs. Young*, 23 An. 272; *Amory vs. Black*, 13 La. 264; *Ryder vs. Frost*, 3 An. 523. Such acts are abundantly established in this case.

5. There is not the slightest foundation for the defense of error and fraud set up by Mrs. Whetstone. It is not pretended that plaintiffs practised any fraud or did anything to lead her into error. The deed was prepared by her husband, and presented to her for signature by him. If she failed to read it, it was her own fault, and plaintiffs cannot be affected by any error resulting from her own gross negligence. *Watson vs. Bank*, 22 An. 14; *Keough vs. Foreman*, 33 An. 1439.

6. The pretense that the advance of \$2,500 made by plaintiffs as the consideration of the deed, was made for account of Robert Whetstone individually and not of his wife, is abundantly refuted by his letters, by the acts of the parties and by the recital in the deed itself.

7. The defense of illegality of consideration is without foundation. The consideration was \$2,500 in money. That money was invested in cotton futures by her direction through her agent. Plaintiffs did not sell her the futures. They are not dealers in futures. They simply acted as her agent in investing her money as she directed them. Moreover, there is not in the record a word of evidence showing the nature of these future transactions, which, for aught that appears, may have been perfectly legitimate purchases of cotton to be actually delivered and paid for in the future.

8. The release given by plaintiffs to Mrs. Whetstone, "from all obligations that may have arisen on account of the firms of Whetstone & Co. and Whetstone & Ellis," manifestly has nothing to do with this case. There were no obligations remaining on Mrs. Whetstone touching this transaction.

The property had been transferred. The price had been paid. Nothing remained except the *right* of Mrs. Whetstone to redeem by paying back the price before June 1st.

Defendants' claims are without the semblance of equity from any point of view. It is undeniable that plaintiffs have parted with \$2,500 as the consideration of this deed, according to the direction of Mrs. Whetstone and for her exclusive benefit.

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She seeks to escape from her obligation, not only without tendering, but without even expressing her willingness to refund this consideration. We find, however, no support for plaintiffs' claim for damages, and reject their prayer for amendment in that respect.

Judgment affirmed at cost of appellants.

No. 8877.

STATE OF LOUISIANA VS. WALDEMAR BILLE.

When the ruling of the trial court striking from the record a plea of *autrefois convict* has been held to have been erroneous, we cannot consider the merits of the plea which have never been passed on below, but are compelled to reverse the judgment and remand the case to be proceeded with under the reinstated plea.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Luzenberg, J.

J. C. Egan, Attorney General, for the State, Appellee.

W. R. Whitaker for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Having been convicted of publishing as true a forged promissory note, under a charge of forging, uttering and publishing as true, etc., the defendant appeals from a sentence of ten years' hard labor, and seeks relief under alleged errors of the District Judge in illegally disposing of his plea of *autrefois acquit* and *autrefois convict*, and of his refusal of a new trial.

1. The plea was predicated upon the following facts and incidents :

Under a similar charge the accused had been previously tried in Section "A" of the Criminal District Court, where he had been found guilty under the second count of the information.

After his conviction and before sentence the court, on its own motion, ordered an arrest of judgment to be entered, and discharged the accused without day. Ten days later the minutes of the court were amended so as to show that the arrest of judgment had been ordered for the reason that the cause had not been allotted to Section "A," in which the trial had taken place. On the day that the accused was discharged in that Section, an information was presented against him for the same offense and was allotted to Section "B," where he was tried, convicted and sentenced.

His plea of *autrefois acquit* and *autrefois convict* urged that, on his trial for the identical offense in Section "A," he had been acquitted

of the offense charged in the first count of the information, and that he had been lawfully convicted of the offense charged in the second count. The plea was met by the State with a motion to strike it from the record, for the reasons that it did not set forth in full the former information and conviction, that it was a double plea, that it was not sworn to, that it did not show the identity of the prisoner, or show that the court which tried the case had jurisdiction of the same.

This motion prevailed and the plea was stricken out. That ruling is erroneous.

No law requires that the plea should be supported by an oath; it is clear that the identity of the accused could have been proven under the averment.

The allegation that he had been *lawfully* convicted was broad enough to admit proof of the jurisdiction of the court by which he had been tried.

Section 1065 of the Revised Statutes provides that: "In every plea of *autrefois convict* or *autrefois acquit*, it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be) of the said offense charged in the indictment."

No other formalities are prescribed by our law; none should have been required. As the accused claimed to have been acquitted of the offense charge in the first count and convicted of the offense charged in the second, his plea was not defective because he alleged both *autrefois acquit* and *autrefois convict*.

Hence, we conclude that the motion to strike out should have been overruled, and that the plea should have been considered. But, in our opinion, the plea should have been overruled on its merits, and the accused has therefore received no practical injury through the erroneous ruling of the court. Defendant's counsel earnestly contends that the trial in Section "A" was regular, legal and final, and that it was, in every respect, sufficient in law to sustain his plea. He contends that the jurisdiction of the first trial court is shown by an entry in its minutes in these words: "Apportioned by lot to Section 'A' of this Court," and he argues that, under such showing, the order in arrest of judgment, and discharging the accused, had operated a final disposition of the cause, without any showing of record that the case had not been regularly allotted to that court.

But, in thus reasoning, counsel entirely loses sight of the well established right of the court to amend its minutes, in any case, at any time, even after an appeal has been completed and is pending before this Court, so as to make them conform with the truth as it occurred.

This doctrine, consecrated through a mass of recent decisions, is now a conspicuous rule of our criminal jurisprudence.

The amended minutes of the court are unmistakable proof that the case had not been allotted to that court, and that therefore it had no jurisdiction to try the case. Had the court pursued a different course, and passed sentence on the convict, its judgment would have been reversed on appeal, the verdict would have been set aside, and the cause would have been remanded for further proceedings according to law. *State vs. Adotto*, 34 An. 1.

Had the want of jurisdiction of the court been brought to the attention of the Judge by the accused, through a motion in arrest, his plain duty would have been to sustain the motion, and it is conceded by defendant's counsel that, under such a showing, his plea would have no force. But he contends that the case is different when the arrest of judgment is ordered by the court, on its own motion, and he relies on Article 5 of the Constitution, which provides as follows :

"Nor shall any person be twice put in jeopardy of life or liberty for the same offense, except on his application for a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained."

We must confess that the difference of the effect between an arrest of judgment ordered by the court on its own motion, and an arrest sustained on the motion of the accused, is not easily discerned, and is too subtle for our comprehension. We understand the following rule to be not only supported by reason and law, but as firmly sanctioned in criminal jurisprudence :

To sustain the plea of *autrefois acquit* or *autrefois convict*, the trial invoked as the basis of the plea must have been legal, regular and final, and before a court of competent jurisdiction. *State vs. Hornsby*, 8 R. 583; *State vs. Ritchie*, 3 An. 715; *State vs. Walters*, 16 An. 401; *State vs. Taylor*, 34 An. 780.

"If the court had no jurisdiction, * * the conviction will be treated as a nullity;" and "the person convicted may be lawfully tried precisely as if no such proceeding had ever taken place." *Waterman's Digest*, p. 227, Secs. 45, 46.

Hence, we conclude that the defendant is entitled to no relief under his plea of *autrefois acquit* and *autrefois convict*.

2. His motion for a new trial urged the following errors :

"First, because there was no evidence adduced upon the trial showing that the paper alleged to have been forged and altered, was in fact a promissory note; that it was necessary to establish by proof the allegation that said paper was a promissory note, to entitle the State, on proof of uttering, to a verdict against the defendant; that it was

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not shown that said paper contained any statement of value received, or any statement amounting in substance to that, and that without some proof of the existence of such statement in the body of the paper, it could not be regarded by the jury as a promissory note and the subject of the offense charged.

"*Second*, because in this particular, the verdict was contrary to the charge of the court, the court having instructed the jury that to entitle the State to a verdict, it was necessary that it should have been proven that a forged promissory note was uttered by the defendant.

"*Third*, because there was no evidence before the jury, showing that the paper alleged to have been forged and uttered was in the slightest degree calculated by its appearance, in the matter of handwriting or otherwise, to deceive any one as the writing of Duncan Sinclair, forgery of whose signature was made the basis of both counts of the indictment here, and without such proof a verdict of guilty could not be justified.

"*Fourth*, because in these respects, and generally, the verdict herein upon the second count was contrary to law and the evidence in the case."

The mere reading of these alleged errors shows that they involve questions of fact exclusively, and hence we have neither the power nor the means of examining them.

The defendant had taken another bill of exceptions, which he does not now mention in his brief, and which presents no substantial matters of defense.

Judgment affirmed.

ON REHEARING.

FENNER, J. We are compelled to admit our error in proceeding to pass upon the merits of the plea of *autrefois convict*, after reversing the ruling of the lower court striking the plea from the record.

The grounds of the motion to strike out were exclusively formal, and did not, in any manner, involve the merits of the plea, which had never been passed on by the lower court.

Upon the overruling of the motion to strike out, which we hold should have been done, the State would be bound to demur, if admitting the facts the plea would be insufficient in law, or to put the plea at issue. The issues thus made should be passed on by the trial court before they can become proper subjects of our appellate cognizance. The demurrer, of course, would be passed on by the Judge; but if the plea went to trial on issue to the merits, such issue, being one of mixed fact and law, would be triable by jury.

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We cannot assume original jurisdiction of these questions, but must abide the action thereon of the trial court, whose rulings, when made, will be reviewable on appeal.

Had not the counsel for defendant, in his original brief, devoted much of his argument to showing that his plea had merit and that he had been, therefore, damaged by the failure to consider it, we should not have been led into this error; but, nevertheless, the interests of sound jurisprudence require its correction.

It is, therefore, ordered that our former decree herein be annulled and set aside, and it is now ordered that the judgment and sentence appealed from be reversed, and the case be remanded to the lower court, to be there proceeded with according to law.

No. 1095.

POMPEY JACKSON VS. JOS. LEMLE ET AL.

Where a sale is made with the right of redemption, and the term expires, within which the price is to be returned, it is not required that the purchaser should have the failure to redeem judicially declared before he can become or be regarded as the absolute owner of the property. No divestiture of the right of redemption results unconditionally from the default of the seller.

Leasing the property by the vendor after the time for redeeming has passed, in the absence of error or fraud, concludes him from asserting title thereto. When after the sale the vendor continues to occupy and cultivate the land, and the purchaser to furnish supplies, payments made by the former to the latter, with or without agreement to that effect, must be imputed to the privilege for such supplies.

Where parties have the legal capacity to contract, mere ignorance on the part of one of them, and inability from such cause to understand the contract after it is read to him, is not sufficient ground to avoid the same.

A PPEAL from the Fifth District Court, Parish of Ouachita. *Richardson, J.*

J. H. Dinkgrave and Robt. Ray for Plaintiff and Appellant.

Stubbs & Russell for Defendants and Appellees :

1. After the delay granted in a *vente à remere* has elapsed, whether the act be considered as such or a common law mortgage, unless fraud or want of consideration or novation be shown, the vendee's title is unassailable. *Hearnan vs. Glades*, 29 An. ; *W. R. Longue*, 632.
2. A contract by which a plantation is sold for a sum which the vendor agrees to advance in yearly instalments to the vendee for the cultivation of the property sold, with a stipulation that the vendee promises to reconvey the plantation to the vendor on reimbursement of the money and interest, is not one of hypothecary or pignorative security, but it is a regular sale, with the right of redemption, the title of which is only defeasible by the exercise of the right of redemption. *Levy vs. Ward*, Admx., 32 An. 784.
3. When one debt is secured by mortgage, and the other, if for supplies and cash furnished the farmer to make a crop, in the latter case the law provides a special privilege, and the

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- proceeds of crop must first be imputed to the debt of the furnisher of supplies. *Richardson vs. Dinkgrave*, 26 An. 657.
4. The lessee cannot contest the title of his lessor, *a fortiori* that of his lessor's vendee. *Pothier Oblig. No. 20 of Contract of Lease*, 133; 10 La. 360; 8 R. 213; 23 An. 585; 26 An. 189; 29 An. 206.
 5. A lease of land, unless recorded like a sale, cannot affect the lessor's vendee. 3 An. 198.

The opinion of the Court was delivered by

TODD, J. The plaintiff, alleging himself the owner of the land described in his petition, that he had once transferred it to Lemle, one of the defendants, as security for a debt which he, plaintiff, had afterwards paid, alleging also his possession of the land, and that Lemle was attempting to sell it to Mrs. Seal, the other defendant, asked for and obtained an injunction restraining Lemle from putting Mrs. Seal in possession of the land, and the latter from taking possession of it, and asked to be decreed the owner of the property, etc.

Lemle, after the general issue, for answer alleged, that he had bought the land of the plaintiff, granting in the act of sale the right to redeem it within a stated time, by repayment of the price; that no part of the price has been returned, and that after the time to redeem had expired he had leased the property to the plaintiff, and subsequently sold it to his co-defendant, Mrs. Seal.

Mrs. Seal answering, asserted her ownership of the land under her purchase from Lemle. From a judgment rejecting his demand, the plaintiff has appealed.

The evidence establishes that the plaintiff sold the land in question to Lemle, in 1879, by public act. The act declaring that the price was \$480, cash in hand paid; and in consideration of the same, that Jackson bargains, sells, transfers and delivers the property. Then follows the following stipulations:

"It is agreed and understood by and between the parties to this act, that the said Pompey Jackson is to have and herein retain the right to redeem said property hereinbefore described as sold by him to said Lemle, by repaying to him, the said Lemle, the price stated herein, provided he exercises his said right of redemption by 1st day of March, 1881; and provided further, the said Pompey Jackson, at the same time and as a condition precedent to his right of redemption, shall fully reimburse the said Lemle for all money he shall have paid or liability incurred on account of taxes, and for the preservation of the property and for all improvements he may place thereon, with the consent and approval of his vendor, during the time within which said right of redemption may be exercised. The parties declaring, emphatically, the true intent and meaning hereof to be, that if Pompey

Jackson shall, within the time stated, repay the price herein stated to said Joshua Lemle, together with the outlay he may make for taxes and the preservation and improvement of the property, then the said Lemle shall reconvey said property to Pompey Jackson; and further, if the said right of redemption is not exercised in the time stated, and the said Lemle reimbursed, as above provided, then his ownership of the property shall be absolute and unconditional."

It is further shown, that after the date mentioned for the redemption of the land, the plaintiff leased the same from Lemle, and continued to occupy and cultivate it up to the time of the institution of this suit.

The act under which Lemle claims the land is undoubtedly a sale with the equity of redemption. The sale was by public act, and without the stipulation of delivery expressed in the act, in legal contemplation, possession followed the title, and the possession of Jackson, after the act, was the possession of Lemle. Apart from the conditions respecting the right to redeem, a sale with the equity of redemption does not differ, as far as relates to the possession of the property as affected by the passing of the act, from ordinary sales. From the moment of the execution of the act the vendee becomes the master of the property, his title subject to be divested only by the exercise of the right to redeem, and unless that right is exercised within the term stipulated, he remains absolute owner of the property. Nor is it incumbent on the vendee, after the failure to redeem, to have such failure judicially declared, as contended by plaintiff's counsel, in order to confirm his title to the property, or to be recognized and to become its absolute owner. This is a legal sequence of the failure of the vendee to *redeem* within the prescribed time, and no action on the part of the vendee is required to establish it.

On the contrary, it is incumbent on the vendor in such a sale, who asserts that he has repaid the price, as the plaintiff has done in the instant case, to prove it.

The evidence entirely fails to satisfy us that plaintiff has ever paid back to Lemle the price he acknowledged to have received for the land. This is an indispensable condition to his recovery, and he must establish it to a certainty. He pretends to have paid it by cotton, delivered from year to year, and which, it is claimed, should be imputed to its payment, but the proof is positive that the cotton was applied, according to the understanding of the parties, to the payment of the privilege debts for supplies. And, without such understanding, it would be proper thus to impute it. *Richardson vs. Dinkgrave*, 26 An. 657. In fact, in the absence of fraud or error, the leasing of the property by

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Jackson would be conclusive of itself of his forfeiture of the right to redeem, and an irrevocable admission of Lemle's title to, and ownership of, the land. Fraud is charged, but it must be proved, like any other fact, and this proof is here wanting.

The bargain may have been a hard one, and one to which the plaintiff was driven by pressing necessities; but the plaintiff cannot be relieved of contracts of this kind by the plea of ignorance and illiteracy. That ignorance may suffer in its sharp conflicts with superior sagacity, greed and cunning, is one of the penalties of citizenship, for which no immunity can be judicially recognized, simply out of regard for "race, color or previous condition." Where a contract is made between those having the capacity to contract, that contract becomes the law to the parties, from the consequences of which courts are powerless to relieve them, when that contract has been fully understood, or when a fair and full opportunity has been afforded for a complete understanding of it.

That the plaintiff understood the terms and meaning of the several acts signed by him we do not know; that he had an opportunity to understand, and was fully informed respecting the same, the evidence leaves little room to doubt. If he did not understand, it was certainly his misfortune.

With every disposition to relieve the plaintiff from the effect of his unfortunate contract, we find ourselves powerless, under the evidence, to do so. The judgment of the lower court is therefore affirmed, with costs.

No. 1084.

SUCCESSION OF W. L. RICHMOND.

ON OPPOSITIONS TO PROVISIONAL ACCOUNT OF ADMINISTRATRIX.

The administrator of a succession is responsible for the difference of the appraised value of movable effects and the price which they brought at a sale on a second offering made on the same day on which the first offering was made, when such sale was made for what the property would bring, without reference to appraisalment.

No law in this State compels the administrator of a succession to lease its property at auction.

A party who receives funds for minors, without having been appointed and qualified as tutor, assumes the responsibilities of an intermeddler or *negotiorum gestor*, and will owe interest on such funds from the day that they were received by him.

The claim for the recovery of such funds is subject to the prescription of ten years, to be computed from the age of the majority of the minors.

An administrator who acknowledges in writing a claim against a succession, and places such a claim on his first tableau, will be estopped from afterwards contesting such claim, unless he pleads and clearly proves that he had acted through error, caused by the fraud of the creditor.

A PPEAL from the Sixth District Court, Parish of Morehouse. *Brigham, J.*

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H. H. Naff and Todd & Todd for Opponents and Appellees :

An unliquidated claim may be urged by way of opposition to administrator's account. 10 L. 358; 10 An. 224; 29 An. 493.

Compensation can only be plead when defendant's claim is as equally liquidated as plaintiff's. 1 Hennen, p. 254, § 5.

Oral evidence is admissible to prove that deceased admitted that he owed a debt; this evidence, when admitted, cannot have the effect to interrupt prescription, it only proves the indebtedness.

When an administrator allows an account, prescription is interrupted. 30 An. 853, 1071.

One who falsely represents himself as tutor of minors and collects money due them, is a *negotiorum gestor*, and he can only plead the prescription of ten years against an action by the minor to recover the money collected by him. C. C. 3544; 15 An. 143; 10 An. 385; 19 An. 491; 11 L. 565; 24 An. 565.

Prescription does not run against minors. C. C. 3521; 23 An. 447.

After an administratrix allows a claim, and places it on her tableaux of debts, she is estopped from denying and opposing it. 11 An. 710; 23 An. 764.

Newton & Hall and Ellis & Sugar for Opponents and Appellants :

The claim of a minor, against his tutor, before a liquidation by settlement and account between them, or the legal representative of the latter, cannot be enforced against the succession of the tutor. 29 An. 526; 32 An. 457.

The administrator of a succession, having allowed a claim in error of fact, and through the fraudulent representation of the claimant, has a right to correct the error, and to strike the claim from his account. C. C. 2291; 13 An. 369, 370.

The claim of a minor against his tutor, arising out of the tutorship, is prescribed in four years, to date from his majority. C. C. 356; 10 R. 173; 6 An. 327; 10 An. 658; 20 An. 509.

The same responsibilities attach to one who assumes to act as tutor for a minor, and who has control of his person, as attach to the legally appointed tutor. 26 An. 442-3.

The testimony of one witness, without corroborating circumstances, is insufficient to prove a claim of over \$500. C. C. 2277; 15 An. 639.

Parol evidence is inadmissible to prove any acknowledgment or promise of a party deceased to pay any debt or liability in order to take such debt or liability out of prescription, or to revive the same after prescription has run. C. C. 2370; 24 An. 496.

No person is entitled, at law, to more than what he claims.

The administratrix is liable for the rents of property which she has failed to lease according to law, and which she occupies and uses for her individual benefit.

*John A. Richardson for Opponent and Appellee.**N. J. Scott and E. H. McClendon for the Administratrix and Appellant.*

The opinion of the Court was delivered by

POCHÉ, J. The provisional account filed in this succession on the 5th of May, 1881, was met by numerous oppositions from creditors, some of whom complained of being omitted from the account, and others averred that the administratrix had failed to charge herself with rent for a plantation belonging to the succession, and with other items of credit accruing to the estate, to be hereinafter enumerated.

The most serious complaint was directed against the allowance of two items, \$950 and \$200 and interest, to T. W. and G. A. Scott, for

moneys alleged to have been collected for them by the deceased, their maternal uncle, when they were minors.

On November 23d, 1882, the administratrix filed an amended account the principal feature of which consisted in ignoring the claim of T. W. and G. A. Scott, who thereupon filed an opposition, in which they urged the correctness and legality of their claim, and they also filed a plea of estoppel against the right of the administratrix to repudiate a claim which she had judicially recognized.

The trial on these issues resulted in a judgment which recognized the Scott claim, as well as the claims of nearly all the opposing creditors, and amended the account in increasing the amount to be charged to the debit of the administratrix. This appeal, taken by her and by Newton & Hall, opponents, presents the following points of contention:

1. The liability of the administratrix for the difference between the appraised value of certain movable effects and the price for which they sold at auction, on a second offering made on the same day that the first offering was made, for what they would bring irrespective of appraisement, which difference amounts to thirty-five 5-100 dollars.
2. Her liability for \$180, for rents collected on house and lot in Bastrop, and not accounted for.
3. Her liability for rent of the Home Plantation, at the rate of \$640 per annum, for the years 1882 and 1883.
4. The correctness of a claim of \$77, allowed to A. H. Lindsay.
5. The liability of the succession to T. W. and G. A. Scott for their claim of \$1150 and interest.

I.

We find no error in that part of the judgment which holds the administratrix responsible for the sum of \$35.05, as the difference between the appraised value of movable effects and the amount which they brought at the sale, which was made for what it would bring, without reference to appraisement, and which was therefore made in direct violation of the law governing such sales. C. P. Art. 990. The argument that a new advertisement would have cost as much as the amount of such difference, though plausible and perhaps true in point of fact, cannot overcome the strength of a strict provision of law.

The administratrix undertook the risk, and she must bear the consequences, especially as those particular effects were bought in by herself.

II.

In her amended account the administratrix charges herself with \$142, amount collected by her for rent on the town property; the

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evidence fails to show that such rent was worth more, or that she collected a larger amount; hence, in our opinion, the District Judge erred in charging her with \$180, for rent of the same property during the same space of time. This item must therefore be stricken out.

III.

Opponents contend that the administratrix having failed to lease the Home Plantation, on which she resided since the death of her husband, at public auction for 1882 and 1883, should be held for such rent at its market value, alleged to be \$640 per annum.

The record shows that the administratrix charges herself for such rent for the year 1879 at \$200, and for the years 1880, 1881 and 1882 at the rate of \$50 per annum, and that the rate for 1880 and 1881 was fixed by auction.

We know of no law and we have been referred to none, which compels the administrator of a succession to lease its property at auction. Hence, the administratrix violated no law in omitting this formality for the year 1882, and she had the right to continue her occupation of the property for that year, and is responsible for the value of said rents, as shown by the previous rents which had been made by public offering.

The record shows that, owing to certain litigation which had been pending against the succession, and which was to have been disposed of during the year 1882, after which it was contemplated that the plantation would have been sold, the administratrix would not have been justifiable to offer, in the beginning of the year, an annual lease of such plantation. She should not, therefore, be charged more than fifty dollars for that year's rent, which we conclude was a fair rental, considering the risk of being evicted before the expiration of the year from the result of the pending litigation, and which risk she took.

The same reasoning would dispose of the rent for the year 1883, if the year had terminated and if we were certain of her occupation of the place during the whole year. Hence, in our opinion, this question is premature, and must be relegated for final decision to the next or final account to be presented by the administratrix.

IV.

The administratrix complains, that of the account of A. H. Lindsay, amounting to \$110, the sum of \$77 was for goods furnished to one of the Scott boys, erroneously charged to Richmond, and she states that she approved Lindsay's account through error of fact.

But the evidence satisfies us that the goods were furnished to Scott, who was then a laborer of Richmond's, under the latter's order, and

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that he had bound himself to pay for the same; hence, his succession was properly chargeable therewith, and the administratrix had committed no error in recognizing the claim, which she cannot otherwise dispute.

V.

The claim of T. W. and G. A. Scott is resisted on the grounds:

1. That it was never due.
2. That it is barred by the prescription of three, four and ten years.
3. That in recognizing the claim by a written acknowledgment, the administratrix had been led into error by fraud and deception practised on her by T. W. Scott.
4. That it is extinguished by compensation.

1. The Scott claim is alleged to arise out of the following facts and transactions:

The Scott boys, having lost their parents at an early age, were residing with and being cared for by their uncle, the deceased, when the succession of their maternal grandfather was settled in the Parish of Morehouse, and the sum of \$950 accruing to them from said succession was paid by the administrator thereof into the hands of the deceased W. L. Richmond, who had represented himself to be their tutor and guardian. This occurred in the year 1867. The additional sum of \$200 is alleged to have been received for them, in part payment of some property accruing to them from the estate of their father, who died in the State of Mississippi in 1867, and sold by Richmond. This occurred in 1873. They proceeded to make out their claim through their own testimony and that of other persons conversant with the facts, and the administratrix objected to the introduction of any and all parol testimony, on the ground that such testimony was inadmissible to prove the acknowledgment of a party deceased to pay any debt, in order to take such debt out of prescription. For such purpose the evidence was clearly inadmissible, but for the purpose of proving the origin and past existence of the alleged debt, the evidence was doubtless admissible, and hence, the Judge did not err in allowing its introduction. Under the restriction above indicated, we have considered and weighed the testimony on that point, and it has satisfied us that the sums charged were received, as alleged by Richmond, by whose succession such sums are yet due, unless the claim has been extinguished by some legal mode.

2. The administratrix invokes that of prescription. It is conceded in argument that the plea of prescription of three years is not applicable. As the record utterly fails to show that Richmond had ever been

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appointed as tutor of the Scott minors in this State, or as their guardian in the State of Mississippi, it is equally clear that the prescription of four years cannot avail in the case of a party who receives or collects funds for minors as an intermeddler or *negotiorum gestor*, as is shown to have been the case with Richmond in this record.

His only shield must be found in the prescription of ten years. C. C. 3540, 3544; *Garland vs. Scott*, 15 An. 143; *Harrison vs. Adger*, 24 An. 565; *Succession of Raphael Romero*, 29 An. 494.

Now, it is an elementary provision of our law that prescription does not run against minors, except in certain cases not herein presented. C. C. 3522.

Hence, the ten years must be computed from the time at which these opponents respectively reached their majority. The record shows that T. W. Scott became of age in the year 1871, and G. A. Scott reached the same age in May, 1875. As this opposition was filed in March, 1883, the solution of the plea as to him suffers no difficulty whatever.

In the case of T. W. Scott, the plea is defeated by the written acknowledgment of his claim, together with his brother's, by the administratrix in October, 1879, two years before prescription would have acquired.

It is now settled in our jurisprudence, that the acknowledgment of a debt by the administrator of a succession operates a legal interruption of prescription, which is thereby suspended as long as the property of the succession remains in the hands of the administrator for administration. *Twendle vs. Debouchel*, 32 An. 753; *Succession of J. C. Patrick*, 30 An. 1071; *Renshaw vs. Stafford*, 30 An. 853.

3. But the administratrix contends that her acknowledgment of this claim is stripped of legal effect, because it was made in error of fact, through the misrepresentations of T. W. Scott, who stated to her, on presenting his account for her approval, that she was advised by her attorney to acknowledge the same, and that she discovered the deception later. Having acknowledged this account in October, 1879, having placed it as a debt of the succession on her tableau in May, 1881, she cannot be allowed to escape the legal effect of such acts which amount almost to a confession of judgment, without proving clearly the alleged error under which her good faith was deceived, and the burden of proof is exclusively on her. *Succession of Mulhern*, 33 An. 1047. The evidence utterly fails to establish the alleged deception, and even absolutely negatives the obnoxious charge. Her silence from October, 1879, to November, 1882, when she filed her amended tableau, and her failure to sooner denounce such a bare deception, involving a heavy claim against her husband, who, to her avowed knowl-

edge, owed money to these opponents, who had been raised, and had lived for several years under her roof, speaks louder than words in refutation of this charge, which is manifestly an afterthought, and the offspring of an imagination more fertile in resources than hers.

We, therefore, hold her written acknowledgment as a legal and complete interruption of prescription.

The exception filed to the opposition of the Scotts, that their action should have been one for an account of tutorship, has no force, and is disposed of by that part of our opinion which settles the status of Richmond towards his minor nephews. The objection that, in their opposition, the Scotts asked judgment for only \$950, and that the judgment erroneously allows them more than they prayed for, is met by their plea of estoppel filed later, in which they assert their right to recover the full amount of their claim as allowed in the provisional or first account presented by the administratrix. This allegation, coupled with the previous judicial admission of the administratrix, that their entire claim was correct, was sufficient as pleading, to justify the admission of proof, and to sustain a judgment in their favor on proof of the claim.

We note also the fact that no objection based on that ground was made to the introduction of their evidence.

4. The plea of compensation is not sustained by the record which shows, on the contrary, that these minors amply compensated by their labor in the field the support which they received from their uncle, including their board, clothing and a little schooling which he provided for.

The Judge allowed interest at five per cent. per annum on the sum of \$950 from November 1867, and at the same rate on the sum of two hundred dollars from November, 1879. We see no error to the detriment of the succession in that ruling.

Opponents were entitled to interest from the date at which their claims were due. R. S. Sec. 1883; Gonsoulin vs. Migues, 5 An. 565; Fuselier vs. Babineau, 14 An. 764; Courad vs. Burbank, 24 An. 18.

The judgment appealed from is therefore amended, in so far as it allows a credit of \$960 against the administratrix for rent of the plantation for the years 1882 and 1883, and it is ordered that she be charged rent for 1882 at fifty dollars, and that there be judgment of non-suit for the rent of 1883; the judgment is further amended by rejecting the demand of \$180 for rents of the town property for the years 1879, 1880 and 1881.

It is now ordered that said judgment, as thus amended, be affirmed in all other respects, and that costs of appeal be paid in equal proportions by opponents, Newton & Hall, and T. W. and G. A. Scott.

Wood et al. vs. Roane.

No. 1089.

THOMPSON WOOD ET AL. VS. J. S. ROANE.

In the execution of nuncupative wills under private signature, the law authorizes the testator to cause his will to be written out of his presence and of that of the instrumentary witnesses.

The person who has acted as the *amanuensis* of the testator for that purpose is not disqualified, on that account, from officiating as one of the witnesses to the will, and can be counted as one of the five witnesses required by law.

Presentation of a nuncupative will, under private signature, by a testator, admits, supplies, or dispenses with a formal dictation.

Where the will of the husband and that of the wife, or any two persons, are written out by the same party, on the same day, in favor of the same beneficiary, and are presented by the testators separately to the required number of competent witnesses, with the proper statement, at different times though on the same day, they constitute two disconnected, distinct, and independent acts, and are not amenable to the prohibitions contained in Article 1572 of the R. C. C.

The burden of proving insanity rests on the party alleging it.

A PPEAL from the Third District Court, Parish of Lincoln. *S. D. Pearce*, Judge *ad hoc*.

R. G. Cobb and *G. H. Ellis* for Plaintiffs and Appellants.

G. L. Gaskins, *M. Feazel* and *A. Barksdale* for Defendant and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action to annul the testament of Willis Wood and the decree ordering its execution.

From an adverse judgment the plaintiffs appeal.

Of the numerous grounds set forth in the petition, three only will be noticed. They are:

1. That the will was not executed in compliance with the formalities required by law in making nuncupative wills under private signature.
2. That the will was made in violation of the law which forbids two or more persons from making a testatment by the same act, for the benefit of a third person.
3. That the testator was mentally incapacitated at the time of making the will.

I.

The testimony shows that the testator sent for his legal adviser, who responded to the call; that the latter inquired of him touching the dispositions which he wished his will to contain. Wood stated how his property stood, and said that he desired to will all of it to John S. Roane. The legal adviser, Judge E. M. Graham, then went into

another room and there wrote the will. Having drawn it up, he returned to the room occupied by the testator and read it over to him, the testator saying that it was all right. After the reading, the witness folded the will and handed it to the testator, instructing him as to the manner of presenting it to the witnesses. Judge Graham then walked out on the gallery, where the witnesses requested for the occasion were assembled, and asked them to come in and witness the will. They all then entered the room in which the testator was lying in bed and arranged themselves around the same. The testator holding the will in his hand presented it, saying to the witnesses: This is my last will. I want you to witness the signing of it. Judge Graham was standing on the right hand side of the bed and the remaining witnesses at the foot of the same. Judge Graham then took the will handed by the testator, and read it over to him in a distinct voice, in the presence of the other witnesses.

The testator, after being elevated in bed and propped up with pillows, signed the will and after him the witnesses, in the order in which their names appear on it. For some reason not apparent, Judge Graham read the will a second time and called the names of the witnesses. He then folded the paper and presented it to the testator, who asked if it ought not to be recorded. On being answered that there was no objection to such a course, the testator asked his adviser to carry it to the recorder's office and have it recorded, which was done.

The defects of form charged against the validity of the will are: that it was not dictated by the testator; that it was written by one of the witnesses, out of the presence of the testator and of the other witnesses; that it was not presented to five but to four competent witnesses.

Articles 1581 and 1582, R. C. C., contain the whole law by which the validity of the will is to be tested. The first Article provides, that a nuncupative testament, under private signature, must be written by the testator himself, or by any other person from his dictation, or even by one of the witnesses, in presence of five witnesses residing in the place where the will is received, etc.

"Or, it will suffice if, in the presence of the same number of witnesses, the testator presents the paper on which he has written his testament, or caused it to be written out of their presence, declaring to them that the paper contains his last will."

The following Article provides, that "in either case, the testament must be read by the testator to the witnesses, or by one of the witnesses to the rest in presence of the testator; it must be signed by the testator, if he knows how or is able to sign, and by the witnesses, or at least by two of them, in case the others know not how to sign, and

those of the witnesses who do not know how to sign must affix their mark.

"This testament is subject to no other formality than those prescribed by this and the preceding Article."

The contention in the case before us is, that the will was not presented and not read to, and not signed by *five* witnesses; that it was received by *four* witnesses only, the person who officiated as the fifth witness (Judge Graham) being incompetent as such, for the reason that he wrote the will.

The proposition is manifestly unsound and cannot receive our sanction.

If it were true that a witness who *draws* up an instrument is incompetent because of that agency, there would be no reason why the witness who *reads* the will to the others should not be likewise incompetent, and why, if all the witnesses were to read the will, they and each of them would not be also disqualified; nay, why the witnesses who signed the will should not also be treated in the same way. It would rather seem, on the contrary, that precisely because the witness drew up the writing, he should be competent and, in the end, the preferred one.

The law does attach particular and significant importance to the writing of the will by one subscribing it, to attest its correctness. In the confection of authentic wills, the law requires that the will be written by the notary, who is certainly a witness, and a most indispensable one, so much so, that if the will be not thus drawn up by him, and if it cannot validate in some other form, it will be treated and declared a nullity.

The objection is unplausible. It cannot stand the slightest scrutiny, and must, therefore, fall.

We deem it unnecessary to inquire and determine whether the will written by Judge Graham was or not *dictated* by Willis Wood, however much it was declared by this witness so to have been. That feature is here immaterial.

Under the circumstances it was unnecessary that it should have been. It is sufficient that it does appear unmistakably that it was caused to be written by the testator, and that it was drawn up by his *direction*, to put its validity in that respect beyond discussion or doubt. R. C. C. 1648, 1649.

Under Articles 1581, 1582, the testator must either dictate, or, in the absence of dictation, present the instrument which he has caused to be written, and declare that it contains his last intentions. Such presen-

tation and declaration admit, supply or dispense with a formal dictation.

The decision in the Bordelon case, 11 An. 676, invoked by the plaintiffs, was subsequently overruled, both in the Prendergast and Marigny cases, found in 16 An. 219 and 267.

In the last case, the undisputed facts were: "There were present in the room the testatrix, the notary, and four persons officiating as witnesses. The testatrix drew from her pocket a paper, which she handed to one of the witnesses, stating that it contained her last intentions, drawn up by her order. At the request of the notary the paper was handed to him. Whereupon, the testatrix requested him to read the paper. This was complied with, in the presence of the witnesses. She then requested the notary to copy the contents of the paper as her will. He did so, and at the close of each paragraph, read the same to the testatrix, paragraph by paragraph, inquiring of her whether that was her meaning. She answered each time that it was, causing the notary to read over one of the paragraphs which she had not well understood. Then, the whole, as copied from the paper, was read to her, in the presence of the witnesses, and she again declared that this was her will. The instrument was thereupon signed by the testatrix, the notary and the witnesses."

The will of Mrs. Marigny was authentic, and had been attacked because it had not been dictated.

The Court deemed it unnecessary to pass upon that issue, but considering that there had been a literal and strict compliance with the second paragraph of the then Article 1574 (now 1581) of the Code, they held that it was a valid nuncupative testament by private act, and so decreed.

It is somewhat singular that, while one of the learned counsel for the defense has mercilessly, without discrimination, assailed the correctness of all the opinions collected in the report in which the Prendergast and Marigny cases are to be read, and which were rendered by a Court as respectable for learning and integrity as any, he does not hesitate to commend to our careful attention for application, a decision of the same tribunal, which is found in the same volume, but which, he thinks, fortifies his position beyond all fears of capture.

The case was familiar to us. We have, however, again considered it. While we find that the Court took unusual pains in transcribing at length the testimony of the witnesses, we are satisfied that, under the evidence, the conclusions reached are in perfect consonance with the law, such as we understand its spirit and letter, and we fail to dis-

cover in what respect or degree the ruling can possibly benefit the plaintiffs in the instant case.

After analyzing that testimony, the learned Court said that it was evident that the will of Archibald Douglass was neither dictated, *nor* presented by the testator to the witnesses, thus discriminating between a *dictation* and a *presentation*.

We feel no hesitation, in the present case, in declaring that we find that the will of Willis Wood was presented, read to and subscribed by the required number of competent instrumentary witnesses, and that all the forms of the law having been rigidly and scrupulously observed, it must be executed.

We reach this conclusion with exceptional satisfaction, as no fraud or ill-practice is either alleged or proved in the making of the will, and we are at a loss to see how any could have been perpetrated. The mere possibility in the absence of any proof of the actuality of the commission of ill-doings, in the procurement or confection of wills, is entirely inadmissible as a ground for the inexecution of the last intentions of the departed ones, otherwise, even testaments by public acts, which are framed with unusual caution and solemnity, would themselves remain as the barren repositories of sacred liberty.

II.

The second ground of attack cannot be maintained.

The evidence shows that, after the will had been completed, Judge Graham had already retired, when he was called back and requested to make that of Mrs. Wood; that, retracing his steps, he also acted as her *amanuensis* on the occasion, and prepared for her a will by which she instituted the same Roane her universal legatee.

The charge to invalidate the *first* will is, that, with the second will, it forms one and the same act, by which Wood and his wife have conjointly instituted the same person their universal legatee, in direct violation of Art. 1572, R. C. C. (C. N. 968).

The two wills, although executed through the same agency, that is, written by the same person and consecrated before the same witnesses, are clearly the separate deeds of two different persons, and are unmistakably two distinct and independent acts, which are not amenable to the charge of *conjunction*, or unity of confection.

It is only where two or more persons, by one and the same act or instrument, which is a unit, or entirety, from its beginning to its end, conjointly dispose of their property in favor of the same party or beneficiary, that the condemnatory provisions of the law can be applied. C. N. 962; Marcadé IV, liv. I, Donations and Testaments, p. 3, on

Wood et al. vs. Roane.

Art. 968 C. N.; Toullier 5, p. 380, Nos. 345, 347; Pothier, Test. ch. 1, Art. 1; Merlin Rept. 17, Test. Conj. No. 1, p. 812; Duranton 9, No. 8.

The authority in 12 An. 880, Orelime vs. Haggerty, far from supporting the proposition advanced, demolishes it most effectually.

The act was one in the authentic form. The preamble states, that at the instance of Haggerty and of his wife, the Recorder had repaired to their residence to receive their last wills in presence of named witnesses expressed, called upon by the testator and the testatrix for the very purpose.

After this preface, *the act* continues: And then and there personally appeared the said J. Haggerty, who has dictated his will to the Recorder, who has written it such as it was dictated and as it follows.

Next comes a formal conclusion and the signatures of the testator and the witnesses; and the Recorder immediately below, and in continuation, wrote a protocole similar to that heading the husband's will, using the name of the wife, after which follow a formal conclusion and the signatures of Mrs. Haggerty, the witnesses and the Recorder, *ex officio* notary.

It is evident that the instrument was in reality a connected act and not two distinct and independent acts. It bears the signature of the notary but once, and that at the conclusion of the second recital. The first will was incomplete for want of the Recorder's signature. The second will formed part of it, and both were amenable to the charge levelled against them of being one and the same act, by which two persons had willed their property to a third person. They were blended together so completely, that it could not but be said, as in truth it was the fact, that they constituted one and the same continuous act. Nullity was the unavoidable consequence of the infraction of the prohibitory law.

III.

The charge of mental incapacity is not at all supported by any evidence. Among the parties who acted as witnesses at the making of the will is to be found the attending physician of the testator. Our attention is merely called to the evidence without any effort to *show* what it is. We deem it unnecessary to even state what was the evidence of sanity adduced. Sanity being presumed, the burden was upon plaintiffs to disprove or rebut it, and in this they have utterly failed.

The evidence received to probate the will justified the conclusion of correctness reached by the Judge in the *proces verbal* of the proceedings. C. P. 933 to 943.

There being no error in the judgment appealed from, rejecting plaintiffs' demand for the nullity of the will of Willis Wood, and the probate thereof, it is affirmed with costs.

State vs. Johnson.

No. 1077.

THE STATE OF LOUISIANA VS. SHAD JOHNSON.

Before a witness can be discredited on the ground of having made a contradictory statement to that made on the trial, such mode of discrediting cannot be resorted to, unless the proper foundation is first laid by asking the witness whether he had made such statement, giving the particulars of the time, place or circumstances under which it was made. Where this cannot be done, because the witness sought to be discredited is dead, the proof of such contradictory statement will not be admitted.

A PPEAL from the Sixteenth District Court, Parish of East Feliciana,
Klenan, J.

Chas. E. Lea, District Attorney, for the State, Appellee.

F. J. Kernan and *T. B. Lyons* for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant was convicted of larceny, and appeals from a sentence of fifteen months' imprisonment at hard labor in the penitentiary. His sole complaint before this Court is to the ruling of the trial Judge, excluding certain testimony, to which a bill of exceptions was taken, appearing in the record. The bill shows:

That there were two trials in the District Court; that on the first trial one S. B. Kent testified, as a witness for the State, touching the identity of the property charged to have been stolen. This witness, Kent, died before the second trial, and at this second trial testimony was admitted to prove what Kent had sworn to on the previous one. A witness, Robins, was called by the defense, and testified in rebuttal of the testimony of Kent, the deceased witness. After so testifying, Robins was asked what Kent had told him, immediately before and after the former trial, in regard to the identity of the property, "and the connection of the accused with said charge." This was objected to as hearsay, the objection sustained, and the testimony excluded.

The ruling was correct. It does not appear from the bill that the rejected testimony was offered to impeach the credibility of Kent. Such purpose is not stated in the bill. If such was not the purpose, the testimony was clearly inadmissible, on the ground of being hearsay. If offered to discredit the deceased witness, it was equally inadmissible, for the reason that a witness cannot be discredited in this manner unless the alleged contradictory statement has first been called to his attention, as to time, place and circumstance, or otherwise designated with sufficient certainty; and this foundation must first be laid before such mode of discrediting can be resorted to. *Greenleaf, Evidence, Vol. 1, p. 636.*

Bates vs. Behen.

Nor does the impossibility of laying such a foundation, on account of the death of the witness sought to be discredited, dispense with the application of the rule, or rather, affect the principle involved in it; for this rule is intended not only for the protection of the witness, but for the elucidation of the truth. Greenleaf says: "that common justice requires that, by first calling the witness' attention to the subject, he should have an opportunity to recollect the facts and, if necessary, to correct the statement already given, as well, as by a re-examination, to explain the nature, circumstances, meaning and design of what he is proved elsewhere to have said." Vol. I, p. 639. And in a note on same page we find this language: "The utility of this practice is illustrated by a case mentioned by Mr. Justice Cowen, in his notes to Phillips on Evidence, in which a highly respectable witness, sought to be impeached through an out-of-door conversation by another witness, who seemed very willing to bring him into contradiction, upon both being placed on the stand, furnished such a distinction to the latter as corrected his memory and led him, in half minute, to acknowledge he was wrong."

If this wise and salutary rule is varied or departed from, with respect to the testimony of a dead witness, because of the impossibility of its application, we can readily perceive what facility it would afford to the impairment or destruction of testimony of the very highest character and entitled to the most implicit confidence. For these reasons we are confirmed in the correctness of the ruling complained of.

The judgment and sentence appealed from are, therefore, affirmed with costs.

No. 1100.

EMMA C. BATES, WIFE, VS. WILLIAM F. BEHEN, HUSBAND.

Article 138 Civil Code, relative to separation from bed and board, is not repealed; affirming 32 An. 1174.

The conclusions of the Judge *a quo* on questions of fact involved are concurred in.

APPEAL from the Third District Court, Parish of Union. *Graham, J.*

Young & Holbert for Plaintiff and Appellee.

McClendon & Barksdale for Defendant and Appellant.

The opinion of the Court was delivered by FENNER, J.

State ex rel. Wentz vs. Judge.

No. 1102.

THE STATE EX REL. WENTZ VS. THE JUDGE OF THE FIFTH
DISTRICT COURT, PARISH OF OUACHITA.

A mandamus does not lie to compel a Judge to render judgment, or to sign one which is tendered him by counsel, in accordance with the verdict of a jury, when there is a motion for a new trial pending and undecided, and where the Judge *proprio motu* has quashed the verdict and reinstated the case to be tried anew.

APPLICATION for Writs of Mandamus and Prohibition.

T. O. Benton for the Relator.

The opinion of the Court was delivered by
BERMUDEZ, C. J. This is an application for a mandamus and for a prohibition.

The relator complains that the District Judge has refused to sign a judgment which his counsel had prepared and tendered to him, approving and carrying out a verdict in his favor, and that said Judge has subsequently not only entertained a motion for a new trial, offered by the counsel of the party cast, but has gone so far, *proprio motu*, as to quash the verdict and reinstate the case to be tried *de novo*.

The District Judge returns justifying his conduct.

The verdict of a jury is not conclusive upon the presiding Judge. He may approve or disapprove it. In the first instance he must render judgment, and if no motion for a new trial has been made, and if the legal delay has elapsed, it is his duty to sign it. In the last case he may, in the exercise of the discretion vested by law in him, set the verdict aside on rendition, or take time to consider of its correctness. It is only after being satisfied with such correctness of the verdict, that it becomes his duty to render judgment upon it, and in due course to affix his signature to the judgment. When, however, he has not reached such conclusion, the law forbids him from rendering and still less signing a judgment in furtherance of the verdict.

In the present instance, the Judge declined to sign the judgment tendered to him, not so much because it was prematurely offered, but chiefly because he entertained grave doubts as to the correctness of the verdict. While he was thus in doubt, a motion for a new trial was made, which was not brought up by either party to his attention for review before the adjournment of the court. He was not bound to notice it of his own accord. It was incumbent upon one of the parties in interest to have called it up, and requested the action of the court

Trimble vs. Pleasant et al.

upon it. Then only is it that the law could make it the duty of the court to pass upon it and, if overruled, to render judgment on the verdict. C. P. 546.

The court had adjourned without any action on the motion for a new trial. Whether the motion did or not abate, or was or not still pending, when, at the opening of the next term, the Judge was again asked to sign the judgment, he was still justified in refusing to sign.

The Judge had no authority to sign the judgment without first disposing of the motion, which could not be done unless contradictorily.

He would in doing so have committed a wrong. 12 An. 562; 6 An. 252; 32 An. 208.

But it so happened that the Judge, not only declined thus irregularly to render and sign the judgment prepared by counsel, but also (his views having ripened, and the amount allowed by verdict of the jury being considered by him as excessive and outrageous) deemed proper, in the exercise of the discretion which the law vests in him, more specially in instances of this description, to quash the verdict and order a new trial. C. P. 538, 539, 547; 10 La. 209; 8 An. 92; 10 An. 776; 33 An. 883.

With the exercise of such discretion, this Court has no authority *presently* to interfere.

We, therefore, conclude that it was not the duty of the District Judge to sign the judgment presented, and that he had full legal power to annul the verdict and reinstate the case to be tried anew.

Hence, the application must be dismissed at the cost of the relator.

No. 1098.

FRANK E. TRIMBLE VS. B. F. PLEASANT, SHERIFF, ET AL.

An allegation that a certain property is worth not less than a stipulated sum, is sufficient to admit evidence to show that the property is worth more than the stipulated amount.

Motion to dismiss overruled.

Courts can allow no relief which is not prayed for in the pleadings.

A PPEAL from the Third District Court, Parish of Union. *Graham, J.*

J. E. Trimble for Plaintiff and Appellant.

A. Barksdale for Defendants and Appellees.

The opinion of the Court was delivered by POCHÉ, J.

Glen vs. Breard et al.

No. 1092.

R. P. GLEN VS. A. G. BREARD ET AL.

The enumeration of the various works of public utility and advantage, for which corporations were authorized in Section 683, Revised Statutes, was exemplary and not exhaustive, and all similar and analogous enterprises were covered by the concluding words, "and generally all works of public utility and advantage."

The business of establishing a wharfboat and a steam elevator at the river bank of the port of Monroe, for the convenience of river carriers and of all shippers and receivers of freight, and of carrying on, through such instrumentalities, a receiving, forwarding and storage business, falls within the purview of the law.

The members of such a corporation are not liable to be sued, as individuals, for the corporate debts.

A PPEAL from the Fifth District Court, Parish of Ouachita. *Richardson, J.*

Robert Ray and D. C. Morgan for Plaintiff and Appellant:

1. Corporations, unauthorized by law, have no standing in court except in the individual names of all the members who compose it. C. C. 446; 33 An. 635.
2. Dealing with a corporation unauthorized by law does not estop the party from denying its corporate existence. 29 An. 371; 16 An. 153.
3. When an exception is pleaded, that all the members of the firm are not made parties, the party making the exception must set out all the members who compose it. 4 L. 106.

Franklin Garrett and Boatner & Boatner for Defendants and Appellees:

1. "The rule of law is, that during the existence of the partnership suit must be brought against the firm and not against individual partners." *Key vs. Box*, 14 An. 497.
2. "Suits against chartered companies must be brought against them under their legal titles." C. P. 119.
3. Plaintiff having contracted with a corporation, as such, in a suit on the contract, both parties are estopped to deny the existence or the legal validity of such corporation. 101 U. S. (xi O.) 392-7; 94 U. S. (iv O.) 22, 680; 33 An. 1448-9.
4. A corporation can be legally formed in Louisiana: to effect insurance to construct, own, or lease, and maintain docks, wharves, wharfboats, steam elevators, drays, floats, and other vehicles for the transportation of freight. R. S. 683; Charter "Monroe W. and E. Co." Art. 2.

The opinion of the Court was delivered by

FENNER, J. The "Monroe Wharfboat & Elevator Co." was regularly incorporated under Sections 683 *et seq.* of the Revised Statutes. Its act of incorporation was duly recorded. It elected officers, as provided in the act, and conducted its business in its corporate name and through its said officers.

It bought a wharfboat from plaintiff, partly for cash and partly for notes, the latter being signed by the president of the corporation and sealed with its seal.

Three of these notes not having been paid at maturity, the plaintiff,

selecting the six stockholders who signed the original act of incorporation, brings this suit against them individually as commercial partners, alleging, in substance, that the corporation had no legal existence, because unauthorized by law, and was therefore a mere private trading company engaged in mercantile business, the members of which were liable individually and *in solido*.

To the petition defendants interposed the following exceptions, among others: 1st, that the "Monroe Wharfboat & Elevator Co." is a legally constituted corporation and can only be sued through its designated officers; and 2d, that having contracted with the corporation as such, plaintiff is estopped from denying its corporate existence.

The exceptions were sustained and the plaintiff appeals.

Much reflection upon the objections urged by the learned counsel of plaintiff to the corporate capacity of the contracting company fails to convince us of their soundness.

The Act of 1855, reproduced in Sections 683 *et seq.* Rev. Statutes, was entitled "An Act for the organization of corporations for works of public improvement and utility." The law authorized the constitution of corporations for various enumerated purposes, and concludes with the words: "and generally all works of public utility and advantage."

Clearly the enumeration was not intended to be exhaustive, but merely to indicate, by various examples, what the law-maker considered to be "works of public utility and advantage." All similar or analogous works or enterprises were manifestly covered by the concluding general expression.

Amongst other examples enumerated in the Act we find the following: "for the construction and maintenance of railroads, bridges, ferries, and other works of public improvement; to effect insurance; to construct and maintain dry-docks or floating docks for the building or repairing of ships or other vessels; to construct and carry on works to compress cotton; to construct and maintain docks, steamships and other vehicles for the transportation of freight and passengers."

It thus appears that enterprises having for their purpose the improvement of the convenience and facilities of intercourse and of handling, transferring and transporting commodities, figure conspicuously among the "works of public utility and advantage" contemplated by the legislator.

Turning now to the charter of this company, in order to ascertain the purposes of its organization, we find them declared therein as follows: "to do a general receiving, storage, transfer and forwarding business, and for the accomplishment of these objects, to own or lease and main-

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tain one or more wharf boats on either bank of the Ouachita River, at Monroe, for the use and convenience of steamboats and other watercraft landing for the discharge or lading of cargoes, * * to store freight or other lading for watercraft, * * and to take insurance risks on such freights or other landing; to construct docks or wharves on the Ouachita River front * * ; to construct and own or lease and maintain a steam elevator or elevators on either bank; to purchase or lease suitable grounds * * and to erect thereon warehouses for the reception and storage of every description of produce or goods that enters into commerce, etc."

We cannot agree with plaintiff's counsel that the purpose of this incorporation is merely to do a receiving, forwarding and warehouse business in a general sense. The whole article is to be taken together, and it clearly discloses the purpose to be the establishment and maintenance of a wharf boat and a steam elevator and warehouses and other appliances and accessories mentioned, with the object of facilitating the transfer of freight, and promoting the convenience of river carriers and of all shippers and receivers of freights at the port of Monroe. This is certainly as much a "work of public utility and advantage" as the maintenance of bridges, ferries, docks, vehicles for the transportation of freight and passengers, cotton presses, and other examples enumerated in the law.

The very name of the company indicates its object, and the evidence establishes that, for the carrying out thereof, it did maintain a wharf boat and did build a steam elevator with a railway from the top of the river bank to low water line, by means of which its business was carried on. It was after the destruction of its first wharf boat by fire that, in order to replace the same, the company purchased the boat of plaintiff, for a part of the price of which this suit is brought.

The argument against the policy of allowing corporations for such purposes, as encroaching on the domain of private enterprise, addresses the legislative, not the judicial ear. Our function is to recognize and enforce the policy actually adopted by the legislature, and we are satisfied that this corporation was organized in perfect consonance therewith.

The evidence does not establish that the company has engaged in the mercantile business of buying and selling goods forbidden by the statute. But if it were true that it had so abused its privileges, and contravened the prohibition of the law, this might furnish ground for forfeiture on proper proceedings, but could not avail plaintiff in the present action.

This relieves us from considering the question of estoppel as to which

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existing jurisprudence seems to be in a confused and contradictory condition. See *Workingmen's vs. Converse*, 29 An. 369; *Citizens' vs. Latiolas*, 33 An. 1448.

Plaintiff's demand is surely wanting in equity, because he seeks to impose upon defendants a liability which they certainly never intended to incur, and which, from the circumstances of his contract, it is apparent he did not expect or believe to exist.

Judgment affirmed.

No. 1085.

S. MEYER VS. FLETCHER, WESENBERG & CO. AND SQUAIR.

The bond which intervenors are authorized to furnish under the provisions of Act No. 51 of 1876, to be restored to the possession of property attached, sequestered or provisionally seized in their hands, is a *forthcoming* bond, designed merely to secure the return of the property at the final determination of the suit, and under which no personal liability for the judgment to be rendered attaches.

Where the condition of the bond has been fulfilled, namely, the property has been surrendered in the condition in which it was received, the intervenors and their surety are entitled to be discharged.

A PPEAL from the Fifth District Court, Parish of Ouachita. *Richardson, J.*

Richardson & Liddell for Plaintiff and Appellant:

ON MOTION TO DISSOLVE.

1. Property of a non-resident debtor is not exempt from attachment because he has a place of business or a commercial domicile in this State. 10 An. 737.
2. When the defendants have, in various litigations with plaintiffs, alleged themselves and their firm to be non-residents, they will not be permitted to deny the truth of their allegations, which have been acted on by plaintiffs, in order to dissolve an attachment. They are estopped from contradicting their judicial allegations. 30 An. 53; 8 An. 141; 3 R. 243; 26 An. 705; 10 An. 94; 34 An. 912, 913; No. 10, Bigelow on Estoppel, 473-9 and 561.
3. In a suit against an intervenor (who is an absentee) on his bond given to release property attached, the action being for a specific amount and based on a contract, authorizes the writ of attachment. 1 N. S. 369; 2 N. S. 323; 6 N. S. 564; 2 An. 154; 12 An. 110; 15 An. 1; 29 An. 88.
4. The attorney-at-law empowered by his client to collect a debt, having the authority to make affidavit to obtain the writ, may sign the attachment bond for his client who is absent. C. P. 245 and 237; 10 An. 35; 6 An. 706 and 4; *Craig vs. York*, Court of Appeals, for East Carroll; C. C. 3000; *Bouvier, verbo agent*.
5. The authority of an attorney-at-law to sign his client's name to an attachment bond cannot be impugned on suggestion. The presumption is in his favor, and the burden of proof on the party alleging the want of authority. *Hennen*, Vol. 1, page 150, on presumption, proof and denial of attorney's authority. 4 R. 23; 10 An. 350.
6. The writ of attachment as against absentees and non-resident defendants is a means of citation used for the purpose of giving the Court jurisdiction, and when the absentee reconvenes for damages he waives all formalities in attachment proceedings. 34 An. 963; 11 R. 396; 4 R. 193; 12 An. 282.

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7. A motion to dissolve an attachment for informalities is waived, if coupled with a reconventional demand for damages, which is a matter for the merits.

ON THE MERITS.

1. Act 51, 1876, authorizes the intervenor in attachments, sequestrations and provisional seizures, to bond property of which they were in possession, upon giving bond within the same delay, with same manner and amount and effect as is now allowed the defendants in such suits.
2. The defendants in attachment suits, to relieve property attached, must give bond in an amount exceeding by one-half the value of the property attached; conditioned to satisfy such judgment to the value of the property attached as may be rendered. C. P. 259.
3. Such bond is a personal obligation which cannot be discharged by the sureties by tendering back the property or pointing out other property for discussion. 18 La. 58; 1 R. 278; 10 La. 108; 16 An. 25.
4. Previous to Act 51, 1876, the court had allowed the intervenor to bond under the theory that he was the agent of the true owner, and intervenors were always held to give bond to satisfy such judgment as may be rendered against the defendant to the value of the property attached, etc. 16 An. 25 and 125; 14 An. 53; 17 An. 314.
5. When an intervenor has filed his petition, under oath, and obtained the order to be allowed to bond property attached, and afterwards presents a bond along with the order of the court and obtains the property, he will be bound on the bond to the extent of the property released, whether he signed or not. 15 An. 465; 11 An. 505.
6. If the conditions of the bond are wanting or informal, the law will reform it. 32 An. 38; McClosky vs. Wingfield, and authorities there cited.
7. The law authorizing a judicial bond forms part of the contract in such bonds. 12 An. 177 and 720; 20 An. 179.
8. It is the duty of intervenors to word their bond in conformity to law. 14 An. 53; 15 An. 465.
9. It is the business of the surety to see that his principals sign the bond. 11 An. 504.
10. No intervention will be allowed after the property attached has been bonded. The bond is a substitute for the property only as to the plaintiff. 16 An. 35; 28 An. 792; 22 An. 751.
11. The lien on the property attached results from the seizure, and not the law; so when the seizure is set aside by bond the lien no longer exists, and all rights are transferred to the bond. Drake on Attachments, Section 277; 18 L. 57; 2 An. 244; 10 An. 49.
12. When the property attached or its proceeds are in the hands of the Sheriff, the seizing creditors will be paid in the order of their seizure; but when it has been bonded, creditor will be entitled to recover on his bond. 16 An. 25; White et al. vs. Hawkins et al., Wright intervenor.
13. The liability of an intervenor on his bond given to release property attached, is fixed by the judgment in favor of plaintiff. 16 An. 25 and 125.
14. The condition of a suspensive appeal bond and a bond given to release property attached, differ only in this, the former bond is to satisfy the judgment in full, while the latter is to satisfy the judgment to the value of the property attached. In appeal bonds the law binds the principal independently of the bond, which is executed for the purpose of binding the surety on the appeal bond. There is no material distinction. 6 An. 706.
15. The property is released upon the contract of the intervenors to satisfy such judgment as may be rendered against the defendant to the value of the property released.
16. When property has been seized under attachment by different creditors, in different parishes, and in each instance is bonded by the same intervenor, though with different sureties and on distinct days, after judgment in favor of plaintiff in one parish, the intervenor, whose liability is thereby fixed, cannot extinguish it by returning the property bonded to the Sheriff of the other parish.
17. The law does not accord to the absentee defendant the right to reconvene for damages

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against the resident plaintiff in attachment, unless the demand in reconvention is necessarily connected with or grows out of plaintiff's cause of action. 9 R. 418; 13 An. 507; 24 An. 208; C. P. 375-6.

Stubbs & Russell and Potts & Hudson for Defendants and Appellants.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action, coupled with an attachment, to recover from the defendants, who are non-residents, the value of movable property of which they obtained possession, as intervenors, in a suit in which the same had been attached. The claim rests upon a bond which the defendants are said to have furnished in the last mentioned case.

The defendants took a rule to dissolve the attachment issued in the present suit, pleaded to the merits and reconvened against the plaintiff.

Exceptions to the right of reconvention were filed and sustained.

The rule to dissolve was made absolute, and judgment was rendered in favor of plaintiff for the amount of his claim, less that of a prior seizing creditor, with interest and costs.

Both parties have appealed from this judgment. The ruling touching the exceptions is not before us for review. It has not even been referred to by the defendants, either in the oral or printed argument.

The defense to the action is, substantially, that the alleged bond is not the *factum* or deed of the defendants; that if it be, it is a *forthcoming* bond, uttered under the provisions of Act 51 of 1876, p. 92, the sole condition of which was the delivery of the property attached at the determination of the suit, and that, at the end of the litigation, the property was actually surrendered to the sheriff, as the legal agent of the plaintiff, and that this surrender operated the release of the intervenors from all responsibility or liability for the possession and keeping of the property *pendente lite*.

We deem it unnecessary to determine whether the bond alleged in the petition was or not signed by the defendants, as principals, or whether they are or not estopped from denying that it is their *factum*.

Conceding *arguendo* that the bond is their deed, the question arising for solution is, whether, under its terms and stipulations, they are liable for the value of the property which was released from seizure, on its being furnished.

It is remarkable that, while the plaintiff makes that bond the basis of his action and annexes it to his petition, he contends that it is illegal in form and substance and should be reformed, so as to make it contain conditions which were not actually incorporated into it. In this, however, he merely repeats the charges which he had preferred against

the same instrument, when he took a rule, afterwards discontinued, on the sheriff, who had accepted it and delivered the property attached, in order to hold him responsible.

Both the plaintiff and the defendants agree that the form of the bond is regulated by the provisions of Act 51 of 1876.

The plaintiff contends that, under the terms of that law which forms part of the bond, it should be read as containing the conditions exacted by the Code of Practice from the defendant in an attachment suit, which are, "that he will satisfy such judgment, to the value of the property attached, as may be rendered against him in the suit pending." Art. 259.

The defendants, on the other hand, insist that under the requirements of the same law, the bond is to be merely a *forthcoming* bond, the object of which is to have the property attached restored to the intervenor, until the final determination of the suit, *when* the possession must cease, in the event of an adverse judgment.

The object of the Act in question was to give to intervenors the right, which they did not previously enjoy by law, of bonding property attached or sequestered, and to prescribe the character of the bond to be given.

The first Section of the Act is to the effect, that in all suits in which property thus seized is in the possession of one not a party to the suit, such third person may, on intervening and on a *prima facie* showing of some title to said property, have the same restored to him, until the final determination of the suit, on executing a *forthcoming bond* in the same manner and amount, within the same delay, and with the same effect as if he were a defendant.

It is clear that the legislature in passing such an Act had some object in view, which was: either to create a right which did not previously exist, or to regulate one, the exercise of which necessitated some legislation, either by enlargement or restriction; in other words, to confer some advantage or to remedy some mischief.

The fact is, that prior to 1876, intervenors had no *legal* right to release by bonding, property attached or sequestered, although they possessed that privilege in cases of provisional seizure.

It was only by judicial sanction, that they were permitted to do so. 18 L. 57; 1 R. 278; 10 L. 108; 14 An. 53; 16 An. 126, 25.

Such rights ceased to be recognized by the Court organized under the Constitution of 1868, which held: that the defendant and the plaintiff alone had a right to bond; that no law authorized an intervenor to bond,

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and that his bond thus taken was not a judicial bond. 20 An. 29; 22 An. 535; 28 An. 244.

It was under that condition of things, in the month of March, when the last decision appears to have been rendered, that the legislature adopted Act 51, which took effect from and after its passage.

The object of that Act was, as stated, to give to intervenors the right to bond and to prescribe the character of the bond.

It is characteristic of that Act, that it terms the bond to be furnished a *forthcoming* bond, the purpose of which was "to have restored to the intervenor the property seized, until the final determination of the suit."

Prior to that Act, an intervenor, in cases of provisional seizure, had a right to bond, where the defendant had not done so, and to obtain the release of the property, which was to be left in his possession, with the condition that he would satisfy such judgment as may be rendered against him or return the property, *whatever it was*. C. P. Art. 289, § 4. The lessee was likewise recognized the right to release on furnishing a *forthcoming* bond, for an amount equal to the value of the property to be left in his possession, or for the amount of the claim.

The obvious purpose contemplated was to place intervenors, in cases of attachment and sequestration, on a footing of equality with intervenors in cases of provisional seizure, and in no way in *duriori casu*. The Act includes the latter. Indeed, if an intervenor in a case of provisional seizure could release the property on a *forthcoming* bond, without making himself responsible in the least for the judgment to be rendered against the defendant, and have himself discharged on surrendering the property entrusted to him, there was no good reason why an intervenor, in a case of attachment or of sequestration, should not be equally benefitted. The intervenor in possession is a plaintiff, and not a defendant. Hence it is, that the Act uses the words, that the third party intervening may have the property seized "*restored to him, until the final determination of the suit, on executing a forthcoming bond.*" The term *forthcoming* characterizes the obligation as being one for the delivery, at a certain time, of the property restored to him and which is to remain conditionally in his possession until the final determination of the suit.

The bond on which the plaintiff sues contains the formal stipulation that if F. W. & Co. and S., or their said security, do not send away the said property, etc., and do faithfully present the same after definitive judgment, in case they should be decreed to restore the same to the plaintiff, then this bond to be null and void, otherwise, etc.

It is evident that the tenor of the bond is that of a *forthcoming* bond.

If the plaintiff, who knew of the form in which it was drawn up, was not satisfied with it, he should have prosecuted, and not discontinued, his rule against the sheriff, or should have stayed the execution of the order, or reinstated the attachment seizure, or taken some step of conservation, which he failed completely to do.

But it is claimed that the condition of the bond, authorized by the Act 51 of 1876, is to be the same as is to be embodied in that which a defendant, in the cases provided for, is required to give when he seeks to release the property. C. P. 259.

The Act does not say so. It merely provides that the intervenor shall execute a forthcoming bond, in the same manner and amount, within the same delay and with the same effect as a defendant. It does not say *with the same condition*. Those words the court cannot interpolate in the law.

There exists no valid reason in law or equity to justify such a construction. Why, indeed, should an intervenor, who seeks the release from seizure of property attached or sequestered in his possession and to which he claims some title, be made liable for the amount of the judgment, if any, to be rendered in the case? Is there any justice in making such intervenor responsible in that manner and to that extent merely because he retains possession of the property seized, to which he claims some title? We can see none. His obligation should be and is, at worst, solely to surrender the property at the determination of the suit and put things in *statu quo*.

But even if the construction claimed was to be put, the question would still remain: whether the intervenor, furnishing such a bond, with such conditions as are required from a defendant, can be bound to satisfy a judgment to the value of the property, unless such judgment has been actually rendered *against him*.

In such a contingency the defendants could not be held, as no money judgment was rendered in the case against them. Their intervention in the previous case was simply rejected, and the property attached and restored to them was declared to belong to the defendant Hall.

We therefore conclude, that the bond required by Section 1 of the Act of 1876, is a *forthcoming* bond, conditioned solely for the delivery of the property restored at the determination of the suit; that the bond in question annexed to plaintiffs' petition is a bond of that character, and that the defendants cannot be held responsible under it, unless its condition has not been fulfilled.

On that subject, the evidence satisfactorily establishes (and it does not seem to be disputed) that the property delivered to the defendants on January 31, was returned by them shortly afterwards, viz: on

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February 25, following, to the same sheriff who had seized it, at the same place, it never having been removed, and in the same condition, the articles consumed having been replaced by others equal in quantity and quality.

The record shows that the plaintiff was aware of the surrender, that he not only refused to allow the seizure of the property thus turned over, but had it released. It also establishes that a *feri facias*, issued in his name, having been levied on that property, he directed the seizure to be raised and he returned the writ.

It is apparent that, if the plaintiff suffer, he has no one to blame but himself in the premises.

This view of the case renders it unnecessary to test the sufficiency of the particular reasons for which it is claimed that the rule to dissolve the attachment in the present suit was made absolute. As the plaintiff has not shown a case in which he is entitled to recover from the defendants, the dissolution of the attachment for that reason, at least, must remain.

For the same reason, we are relieved from the necessity of passing upon the correctness of the judgment, in so far as it awards a priority to another party as a privileged creditor of the defendants.

It is, therefore, ordered and decreed that the judgment appealed from be affirmed, so far only as it dissolves the attachment in this case, and that it be annulled and reversed in other respects.

It is now ordered, adjudged and decreed that the demand of plaintiff be rejected, with judgment in favor of the defendants, with costs in both Courts.

No. 1105.

M. L. MATHON, TUTRIX, VS. MRS. BERRY, ADMINISTRATRIX.

This Court will not grant an extension of time for the filing of a transcript, where it does not appear that the bond required to perfect the appeal was furnished.

ON Motion for Extension of time to file Transcript.

The opinion of the Court was delivered by BERMUDEZ, C. J.

 Haas vs. Haas et al. Stansel vs. Roberts.

No. 1101.

HENRY HAAS VS. R. & E. HAAS ET AL.

A fraudulent and injurious conveyance under cover of judicial proceedings will be revoked, where it is the result of collusive machinations between creditor and debtor, designed to give to the former an undue preference to the injury of other creditors, and the property which is their common pledge is sacrificed.

Transactions which the law mercilessly reprobates and brands will not be permitted to be successfully shielded under the deceptive garb of apparently regular and sanctified judicial proceedings.

A money judgment in favor of such creditor will not be annulled, where the claim is a real one, but in so far as it maintains the attachment, it will be altered by disallowing the same and privileges thereby obtained.

APPEAL from the Third District Court, Parish of Union. *Graham, J.*

J. A. Ramsey for Plaintiff and Appellee.

Young & Holbert, M. Feazel and A. Barksdale for Defendants and Appellants.

The opinion of the Court was delivered by BERMUDEZ, C. J.

 No. 1073.

JOHN C. STANSEL VS. CLAY ROBERTS.

The appellate court will not review a judgment sustaining exceptions, whereby part of the demand is stricken out, where the appeal is taken by the defendant merely from the judgment on the merits, and the plaintiff and appellee, answering the appeal, simply prays for the affirmance of the judgment.

Where a lessee binds himself, for the consideration of rent, to give to the landlord a certain quantity of cotton, and fails to do so, the landlord can be allowed the value of the cotton instead of the product itself.

APPEAL from the Fifth District Court, Parish of Richland. *Richardson, J.*

T. O. Benton and E. C. Montgomery for Plaintiff and Appellee.

Wells & Williams for Defendant and Appellant.

The opinion of the Court was delivered by BERMUDEZ, C. J.

Defee vs. Covington.

No. 1093.

JOHN M. DEFEE VS. C. D. COVINGTON.

When, in a case unappealable to this Court on the main demand, but appealable on the reconventional demand, the verdict of the jury is for a "balance," and the judgment upon it is in accordance, this Court cannot review the merits of the controversy between the litigants without unavoidably considering the main case. It can neither affirm nor reverse the judgment for correction or incorrectness.

There should have been two findings, and if correct, the judgment should have been in consonance.

The District Judge found the verdict erroneous, and should have granted a new trial.

APPEAL from the Third District Court, Parish of Union *Graham, J.*

John Young and A. Barksdale for Plaintiff and Appellant.

G. H. Ellis and Rutland & Killgore for Defendant and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff sued for less than one thousand dollars. The defendant reconvened, claiming more than twice that sum. The case was tried by a jury, who returned a verdict for less than one thousand dollars (\$524), upon which judgment for defendant was rendered, from which he appeals.

The verdict is for "*a balance*." It is evident that, in arriving at the conclusion which they reached, the jury deducted from the amount which they found that the defendant should recover, the sum to which, in their mind, the plaintiff was entitled, but which they did not specify.

There should have been two findings in the case, one on the main, another on the reconventional demand.

The judgment in the main case was appealable to the Circuit Court; that on the reconventional demand to this Court.

In the condition in which the matter is brought up, we cannot determine whether the verdict and judgment upon it are or not correct. We can neither affirm nor reverse the same, after inquiry into the merits, without inevitably considering the main demand which, by the action of both jury and Judge, was blended with the reconventional demand.

The District Judge says that the verdict is erroneous, that the case should have been tried *de novo*, but that, as twice before, the verdict of the jury had been set aside, he thought it was better that the matter such as it stood should be brought up to this Court for final determination.

The only action which we can take in this matter is to set aside the

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verdict, annul the judgment, and remand the case for trial according to law.

It is therefore ordered and decreed that the verdict herein be set aside, that the judgment thereon be annulled, and that this case be remanded for a new trial according to the views herein expressed, and according to law, at cost of appellant.

No. 1072.

THE STATE EX REL. FANNY ROOS VS. A. CURRIE, MAYOR OF
SHREVEPORT.

Mandamus will issue to compel the granting of a suspensive appeal in a case where the constitutionality or legality of a fine, forfeiture or penalty imposed by a municipal corporation is involved, although the pleading before the municipal authority may not have set forth the particular law or constitutional provision violated. The sufficiency of the defense will be adjudged on the appeal.

APPPLICATION for Writs of Prohibition and Mandamus.

The opinion of the Court was delivered by

FENNER, J. Relator was cited to appear before the defendant Mayor, and answer to a charge of violating certain ordinances of the City of Shreveport, relative to houses of ill-fame, etc. She appeared and filed answer denying her guilt, and further alleging that "the ordinance or ordinances upon which this proceeding is founded, and the fine, forfeiture and penalty imposed by the same, are unconstitutional and illegal." After trial, defendant rendered a written decree, adjudging her guilty as charged, condemning her to pay a fine of fifty dollars, and enforcing other penalties.

Relator then applied for a suspensive appeal from this judgment, which was refused. She now asks relief at our hands by mandamus, to direct the granting of her appeal, and by prohibition, to prevent proceedings in execution of the judgment. She is entitled to the relief asked.

The case is manifestly one "in which the constitutionality or legality * * of fine, forfeiture or penalty, imposed by a municipal corporation, is in contestation," and is therefore subject to direct appeal to this Court. Const. Art. 81.

The only excuse urged in the answer of respondent for refusing the appeal is to the effect that the answer is too vague, and does not set forth in what respect the fine, etc., is unconstitutional, or what particular law or constitutional provision is violated.

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Questions of this kind, as to the sufficiency of the pleadings, and of the defense generally, can only be considered by us on the appeal. To authorize the appeal, it is only necessary that the constitutionality or legality of the fine, etc., should be contested.

Such is clearly the case here. We notice the request of respondent to fix the return day of appeal at an early day, but discover no authority in ourselves to interfere with the return day fixed by law, in absence of consent of parties.

It is, therefore, ordered, adjudged and decreed that the alternative writ of mandamus, issued herein, be now made peremptory at respondent's cost.

No. 1079.

THE STATE OF LOUISIANA vs. JAMES MUNSTON.

Admissions and confessions may be implied from the acquiescence of the defendant in the statements of others made in his presence, when the circumstances are such as afford him an opportunity to act or speak, and would naturally call for some action or reply from a person similarly situated; hence, in this case, where it is not shown that the accused was in actual custody, when accused of the commission of a crime, the following charge is not only correct, but extremely liberal to the accused: "standing silent when accused out of court is not presumed as a confession of guilt, but remaining silent when accused of the commission of a crime is a circumstance which, like others, must be considered and weighed by the jury."

An indictment framed in compliance with the provisions of Section 1048, Revised Statutes, need not state the means by which death was inflicted, and need not comply with the common law forms of indictments. *State vs. Bartley*, 34 An. 147; *State vs. Granville*, 34 An. 1088, reaffirmed.

A PPEAL from the Fifth District Court, Parish of Ouachita. *Richardson, J.*

F. G. Hudson, District Attorney, for the State, Appellee.

J. H. Dinkgrave for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Appealing from a conviction of manslaughter, the defendant presents to our consideration two bills of exception and a motion in arrest of judgment.

1. At the request of his counsel, the Judge charged the jury as follows: "standing silent when accused out of court is not presumed as a confession of guilt," and added that "remaining silent when accused of the commission of a crime was a circumstance which, like others, they might consider and weigh."

The complaint is, that the qualification of the charge, as suggested

State vs. Munston.

by the defendant, virtually destroyed all the effect of the instruction, and was injurious to him.

The accused did not object to the admission of the testimony on this point, and he cannot complain that the Judge should instruct the jury to weigh and consider the evidence thus admitted. All evidence when introduced must be considered by the jury. The established rule in criminal jurisprudence on this kind of evidence is, that "admissions and confessions may be implied from the acquiescence of the defendant in the statement of others, made in his presence, when the circumstances are such as to afford him an opportunity to act or to speak, and would naturally call for some action or reply from a person similarly situated." Waterman's U. S. Crim. Digest, Sections 131, 132, 133, 134, 135, 137.

The denial of a charge which may be injurious to one is the first prompting of the human heart, even when the charge is true; hence, Peter himself did not hesitate to deny his master when accused by the servant to be one of them. The rule has the sanction of unvarying human experience, and is uniformly applied by the courts with the only restriction, that an accused in actual custody is not supposed to be surrounded by circumstances such as to afford him an opportunity to act or to speak.

Such were the circumstances in which we found the accused, in the case of *State vs. Diskin*, 34 An. 919, and hence, we there held that he was not concluded by his silence when charged with the commission of the crime of murder.

The great reliance which the defendant places on the ruling of that case cannot avail him, for he does not even pretend that when accused he was in custody, and we infer from the charge which he asked that he was not.

In support of his position counsel for the accused quotes the following sentence from our opinion in the *Diskin* case: "he has the undoubted right to keep silence as to the crime with which he is charged, and is not called upon to reply to or contradict such statements." Taken as an isolated proposition that language would seem to favor counsel's contention, but its effect in that direction is completely destroyed by the preceding sentence, which counsel accidentally omitted to quote, and which reads as follows: "mere silence, while a party is *held in custody* under a criminal charge, affords no inference whatever of acquiescence in statements of others made in his presence." We think that the charge as given by the Judge was extremely liberal to the accused, and that it effectually silences his complaint.

2. The second charge asked by the accused was: "that if the jury believe, from the facts before them, that anyone else than accused could have committed the deed, they will acquit." In lieu of which the Judge gave the following charge: "the jury must be satisfied from the testimony and circumstances developed in the case that the deceased came to his death from the violence and injuries inflicted upon him by the accused, and they should be satisfied of those facts beyond any reasonable doubt; that if they entertained after consideration a reasonable doubt as to the guilt of the accused, they should acquit him."

The charge suggested by defendant is sanctioned by neither law nor authority, while that of the Judge substantially embraces the sound rule of criminal practice, consecrated by an unbroken line of decisions in England, in our sister States and in our own jurisprudence.

The charge must be taken as a whole, and when thus construed, it is apparent that the instruction is not amenable to the criticism to which it is subjected by defendant's counsel. It does not in our minds justify the complaint, that it led the jury to believe that, in the opinion of the Judge, violence and injuries had been shown to have been inflicted on the deceased by the accused. Such a construction can only result from the laudable zeal of counsel whose "wish is father to the thought." Hence, we conclude that the bill has no force.

3. The complaint incorporated in the motion in arrest is levelled at the form of the indictment, because it does not detail the means by which death was inflicted. It charges that the accused "with force and arms in and upon one William Jones, a person in the peace of the State of Louisiana, then and there being, wilfully and feloniously did make an assault, and him the said William Jones, he the said James Munston did then and there wilfully and feloniously kill and slay," etc., and is in strict and literal compliance with the form prescribed by Section 1048 of our Revised Statutes. The common law authorities quoted by defendant's counsel have no possible application as a test for the form of pleadings, which comply with our own legislation. This is no longer an open question, it was forever set at rest by the decisions in the cases of *State vs. Bartley*, 34 An. 147, and *State vs. Granville*, 34 An. 1088.

Our conclusion is, that the defendant has had a fair and impartial trial, and that his complaints are groundless.

Judgment affirmed.

Coats vs. Roberts.

No. 1096.

MRS. ARTEMISE COATS VS. J. M. ROBERTS.

When a minor is lawfully summoned by a sheriff to serve as a member of a *posse comitatus* to aid in the arrest of an escaped convict and, while so engaged, negligently and with legal fault shoots another member of the same *posse* by mistake for the convict, the parent of the minor with whom he resides cannot be held responsible for the damages occasioned thereby.

The law obliged the minor, being of proper years, to serve on the *posse*, and suspended the paternal authority, and subjected him to the exclusive authority of its officer, and paternal responsibility being the offspring of the paternal authority, the legal interruption of the latter operated a like interruption of the former.

A PPEAL from the Fifth District Court, Parish of Ouachita. *Richardson, J.*

Boatner & Boatner for Plaintiff and Appellant.

Robt. Ray for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. The petition discloses the facts that the son of plaintiff and the son of defendant were summoned by the sheriff to serve as members of a *posse comitatus* to assist in arresting an escaped convict, and while acting in that capacity defendant's son, a minor, shot and mortally wounded the son of plaintiff, mistaking, or claiming to have mistaken, him for the convict. It is averred that the sheriff had warned the members of the *posse* not to shoot at the convict unless he refused to surrender when ordered, and that care and caution were necessary for the safety of the other members of the *posse*; and it is charged, that even if the shooting was done under mistake, it was nevertheless reckless and wanton, because done without any hail or order to surrender.

Plaintiff's son having died from the wound, she brings this action to recover the damages which had been suffered by him prior to his death.

Defendant filed an exception of no cause of action, which was sustained.

It being alleged in the petition that the son of the defendant was a member of the *posse comitatus*, and no contrary averment being made, we are justified in assuming that he was lawfully a member thereof. The mere fact of his minority does not of itself exclude this idea. Section 3544, Rev. Statutes, gives the sheriff power to command the services of "every able bodied inhabitant" to serve on the *posse* in proper cases, and requires obedience to such command, and inflicts penalties for refusal to obey. The term and the proceeding being taken

from the common law, we may look to that system for a general notion of the nature and extent of the power. We there find that no persons are exempted from the duty of this service, on the ground of age merely, except minors under the age of fifteen years. *Vining's Abridgt., Sheriff B.*

Therefore, the petition sufficiently discloses that, at the time of the act complained of, defendant's son was under the lawful and exclusive authority and control of the sheriff, placed there, not by the act or will of his parent, but by the power of the law, to which the parent had no means or right of resistance.

The Article 2318 of our Civil Code confines the responsibility of the parents, for the damage occasioned by their minors or unemancipated children, to the cases where the latter are "residing with them or placed *by them* under the care of other persons." These terms seem, of themselves, pregnant with the idea that in a case where the minor is placed under the care and control of other persons, not only without the consent of the parent, but by an authority which he has neither the power nor right to resist, the responsibility of the latter should cease.

Paternal responsibility is the consequence and offspring of the paternal authority. Whenever the law terminates or interrupts the latter, the former is, at the same time, terminated or interrupted.

In France, the minor above the age of eighteen years is permitted voluntarily to enroll in the army against the will of his parents. 2 *Toullier*, No. 1048.

With us he is, after the same age, subject to militia duty. *Acts of 1878*, p. 268.

Would it be claimed that the parental responsibility would continue while the minor was thus engaged in military service, and subject to an authority entirely exclusive of his own?

The fact that, in the case at bar, the suspension of the paternal authority did not last long enough to disturb the residence of the minor with his father, cannot affect the case. Such residence is only important in the eye of the law, as affording the opportunity of exercising the paternal authority, and while such authority is lawfully suspended, it is of no more consequence than would be the like residence of an emancipated or major child. In this case, it is apparent that the law took the minor from the control and authority of the parent, and placed him under the exclusive control of its officer and in a situation which exposed him to the risk of committing the fault which happened. Why should the father be held responsible? We are not called upon to solve the problem propounded by plaintiff's counsel as to who is

Ludeling vs. McGuire.

responsible for the damage occasioned by this unlawful act. Our duty is discharged when we decide the issue presented in the case. Nor do the objectionable consequences anticipated by him flow logically from our decision, which merely holds that when the law, *ex proprio vigore*, destroys or suspends the paternal authority over the minor, it, at the same time, destroys or suspends the paternal responsibility. Judgment affirmed.

No. 1088.

F. B. LUDELING VS. J. E. MCGUIRE, SHERIFF, ET AL.

A tax title, regular in form, duly recorded, and accompanied by possession, cannot be attacked collaterally or disregarded by direct seizure of the property held thereunder, in execution of judgments or mortgages against a former owner; at least, unless absolute nullity of the tax title is patent on the face of the deed.

No such nullity being apparent on the face of the plaintiff's deed, his injunction herein, restraining the seizure and sale of the property by a creditor of a former owner, was properly perpetuated.

A PPEAL from the Fifth District Court, Parish of Ouachita. *Richardson, J.*

J. T. Ludeling for Plaintiff and Appellee.

R. G. Cobb for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The plaintiff, alleging ownership by tax title, enjoins the seizure and sale of the property in execution of a judicial mortgage resting on the property in the hands of a former owner.

Plaintiff exhibits the deed of the tax collector, duly recorded, and accompanied by actual possession prior to the seizure.

If his title is valid, his property is not liable to the seizure.

By constitutional provision in this State, existing since 1868, tax titles are *prima facie* valid. Const. 1868, Art. 118; 1879, Art. 210.

The jurisprudence of the State is perfectly settled that such titles cannot be attacked collaterally, and that the property conveyed by them cannot be seized by the creditor of a former owner, until the tax title has been annulled by direct action. *Coco vs. Thieneman*, 25 An. 237; *Lannes vs. Bank*, 29 An. 115; *Jury vs. Allison*, 30 An. 1235; *Renshaw vs. Imboden*, 31 An. 662; *Hickman vs. Dawson*, 33 An. 441.

An exception to this rule is recognized in the two last authorities,

in the case where the absolute nullity of the title is patent on the face of the deed.

It is clear that whatever defense may be made by defendant herein must appear on the face of plaintiff's title, and that the Judge *a quo* was clearly right in excluding all extraneous evidence offered to impeach said title.

We shall confine our attention to the nullities charged to be patent.

1. It is said that it appears from the deed that the sale was made under Act 107 of 1880, for taxes of 1878; that Act 107 applies only to sales for taxes due prior to January 1st, 1879; that the taxes of 1878 were not due till February 1st, 1879; and that, therefore, the sale was made without authority of law.

The argument falls before our decision in *Davidson vs. Houston*, 35 An., where we held that taxes of 1878 were due prior to January 1st, 1879, and were covered by the constitutional ordinance and, consequently, by Act 98 of 1882. It follows that they fall equally within the purview of Act 107 of 1880.

2. Another cause of nullity urged is, that the sale was made on May 7th, 1881, whereas the Act 107 required it to be made on the first Saturday of March, 1881. Much discussion was had as to whether this provision was directory or mandatory, and as to the effect of a departure therefrom on the validity of the sale.

It is not necessary to consider these questions here. The statutory direction was, that the sale should be made on the first Saturday of March, and "from day to day thereafter." It does not appear on the face of the deed that the sale was not advertised for the first Saturday of March, and continued "from day to day." On the contrary, the deed recites that the sale was made "in accordance with the provisions of Act 107," and with "necessary publications and advertisements," and after compliance "with all the formalities required by and specified in the Act aforesaid."

In absence of extraneous evidence, which is not admissible, it is impossible to say the sale was not made at a time authorized by the Act.

3. The nullity alleged in the assessment of the property certainly does not appear on the face of the deed; nor does it appear from the extract from the delinquent roll, offered in evidence by plaintiff, even if we could extend the exception so as to embrace nullities appearing from plaintiff's own evidence, as well as on the face of the deed.

We find no error in the proceedings and judgment of the court *a quo*. Judgment affirmed.

State vs. Ely and Augustin.

No. 1070.

THE STATE OF LOUISIANA VS. MOSES ELY AND LOUIS AUGUSTIN.

An information that charges, "that A. B. at 8 o'clock in the night time with the felonious intent, the dwelling house of one C. D. feloniously then and there to set fire to and burn, feloniously and burglariously then and there did break and enter the said dwelling house," is not obnoxious to the charge of duplicity, as it charges but one offense, and that offense declared by Sec. 851, Rev. Stat.

A PPEAL from the Twenty-sixth District Court, Parish of Jefferson.
Hahn, J.

Moses Ely, *pro. per.*, Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant Moses Ely was tried, convicted and sentenced to imprisonment at hard labor for fourteen years, under an information charging as follows:

"That Moses Ely * * at about 8 o'clock in the night time * * with the felonious intent the dwelling house of one Sylvester Warner * * feloniously then and there to set fire to and burn, feloniously and burglariously then and there did break and enter the said dwelling house," etc.

The defendant appeals and points out as error the overruling of his motion in arrest of judgment.

This motion is substantially to the following effect:

1. "That the information charges no crime known to the law; that an *intent* to do an act or commit a crime—which the information charges—is no offense until an *attempt* is made."

2. "Burglariously breaking and entering a dwelling house does not constitute an offense. The breaking and entering must be with the intent to steal, rob, etc., as provided by Sec. 851, R. S. No intent to do either act is alleged."

3. "The two supposed offenses are joined in the same count."

We quote from Section 851 of the Revised Statutes as follows:

"Whoever with intent to kill, rob, steal, commit a rape, or any other crime, shall in the night time break and enter * * a dwelling house," etc.

This language of the Statute answers virtually all the above objections. The information substantially follows the words of the Statute. The gravamen of the offense therein declared is the breaking and entering a dwelling house in the night time with the intent to commit a crime. The information expressly charges the breaking and entering in the night time, with the intent to commit a crime, to-wit: the crime

Standifer & Co. vs. Covington.

of setting fire to and burning the dwelling house so broken and entered, or, in other words, the crime of arson.

The charge comprises a statutory offense, and but one offense, with all the necessary averments to make the offense complete, and is not amenable to the charge of duplicity or other irregularity.

The sentence of the lower court is, therefore, affirmed with costs.

No. 1094.

T. C. STANDIFER & CO. vs. J. A. COVINGTON.
MRS. A. C. LOWERY, WARRANTOR.

A party who holds three judgments against the same debtor cannot be allowed to impute a part payment to the interests accrued on all three of his judgments, when it appears from the record that the sum realized by means of an attachment issued in only one of his judgments, to which the credit must be imputed.

A PPEAL from the Fifth District Court, Parish of Ouachita. *Richardson, J.*

C. J. Boatner and M. J. Liddell for Plaintiff and Appellant:

An adjudication to the wife, at sheriff's sale, of property of her husband, subject to a special mortgage imposed thereon by the latter, the payment of which she assumes as the purchase price, is absolutely null and in contravention of Art. 2398 of the Civil Code. 1 An. 304; 5 An. 600; 23 An. 440.

The adjudication of property, subject to a special mortgage, binds the purchaser personally to pay such mortgage as a part of the price. 7 An. 298; 10 Rob. 65, 107; 4 N. S. 154.

A judicial mortgage is not extinguished by a sale under an ordinary judgment or junior mortgage, though the property affected by it be subject to a prior special mortgage, the amount of which is bid at the sale.

Sales under *f. fa.* are made without regard to legal or judicial mortgages, and such mortgages remain unimpaired. 14 An. 665; 8 An. 464; C. P. 710.

Arts. 684, 707 and 708 C. P., have reference solely to special mortgages. 7 An. 614; 5 An. 736, 574; 1 An. 32, 426; 2 An. 617.

A confession of judgment may be validly made out of court and in a suit to be filed thereon. In such case no citation or notice of judgment is necessary. 29 An., *Marbury vs. Pace*.

T. O. Benton, R. Richardson and T. Skillman for Defendant and Appellee.

The opinion of the Court was delivered by
ROCHÉ, J. Defendant's motion to dismiss this appeal on the ground of our want of jurisdiction must prevail.

Plaintiff brought an hypothecary action on three judgments, two for \$369.71, each with interest of 8 per cent. per annum from March 10th, 1874, and one for the sum of \$425.50, with interest of 8 per cent. per annum on \$304.84, and legal interest on \$120.66, both from Novem-

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ber 1, 1876. All three of the judgments were rendered on November 20th, 1876.

The pleadings and the evidence show a credit of \$254.03 in favor of the judgment debtor; and the imputation of that credit according to law is the question involved in the motion.

Plaintiff's contention is, that the credit should be imputed to all the interests which have accrued on his three judgments in the aggregate, and that thus the capital of his judgments would remain about untouched and would show an amount sufficient to give us jurisdiction.

But in this he is not borne out by the record, which shows that the payment of \$254.03 was the result of an attachment issued in the judgment for \$425.50, and that, therefore, the payment must be imputed to that judgment, as was done by the plaintiff himself in an account which he annexed to his answers to interrogatories.

The record further shows that the credit was received but a few days after the rendition of the judgment, and the judgment would bear interests for not more than a month and a half, and that the interests would not amount to three dollars.

The amount involved in the suit is therefore made up as follows:

Amount in capital of the two judgments of \$369.71.....	\$739.42
Attorney's fees of 10 per cent. on same, agreed upon	73.94
Balance of judgment of \$425.50 — \$254.03.....	171.47
Amount in dispute, exclusive of interests.....	\$984.83

Hence, it follows that we have no jurisdiction.

The appeal taken herein is therefore dismissed at appellant's costs.

No. 1086.

S. MEYER VS. THE VICKSBURG, SHREVEPORT & PACIFIC RAILROAD COMPANY.

A debtor's indebtedness cannot be divided without his consent, and hence, he cannot be held liable for an order on a part of his indebtedness, unless he consents to the appropriation, by his acceptance of the draft, or unless an obligation can be implied from the custom of trade, or flows from the nature of the contract between the parties.

Custom cannot prevail against a positive law.

The provisions of Act 134 of 1880 form part of the contract between railroad companies and other parties undertaking public works and their contractors. Hence, a railroad company cannot be held liable on an order for money drawn by one of its contractors, before the latter has made provisions for the payment of the wages due to his laborers, or to those of his sub-contractors, and when said company has refused to accept such order.

A PPEAL from the Fifth District Court, Parish of Ouachita. *Richardson, J.*

Meyer vs. Railroad Company.

Richardson & Liddell for Plaintiff and Appellant.

F. P. Stubbs for Defendant and Appellee.

The opinion of the Court was delivered by

POCHÉ, J. G. W. Cram, who was in the year 1832 a contractor of the defendant Company for the construction of a portion of their road, contracted a debt of \$1,652.85 with the plaintiff Meyer.

His contract with the Company having been cancelled, and having no funds for the payment of plaintiff's claim, he drew in the latter's favor the following instrument:

"JOS. F. MCGUIRE, Esq., Cashier:

"*Dear Sir*—Mr. S. Meyer has a bill against me for \$1,652.85; this is for supplies furnished the men and for time checks. I have offered him this as an order on you to pay the same from my June estimate—I allowing him one month's interest, to be added to the above. Please arrange it mutually and satisfactorily, and oblige, yours truly,

GEO. W. CRAM."

Plaintiff brings this suit against the Company on that instrument, which he construes as operating an assignment in his favor *pro tanto* of the indebtedness of the Company to Cram. He takes this appeal from a judgment rejecting his demand on a defense of general denial.

When the order was presented to the Company through its financial agent, it was refused, with the statement that Cram was indebted to it in the sum of \$6,000, and that his estimates for the month of June would not be sufficient to meet his pay rolls and those of his sub-contractors, and his indebtedness to the Company. Construing Cram's letter as an unconditional order for money, and admitting that when it was presented he had funds in the hands of the defendant, we cannot assent to plaintiff's proposition, that these circumstances operated an assignment under which the defendant could be held responsible for the amount which the draft called for.

It is elementary that a debtor's indebtedness is indivisible without his consent; and in this particular instance, the debtor's obligation to its creditor's employees and laborers was fixed and regulated by law, which imposes on railroad companies the duty of securing the laborers of contractors and sub-contractors for their wages earned in the construction of works for such companies. Act 134 of 1880. Under the provisions of that Act, the defendant could not be legally held as a debtor of Cram for the month of June, until his liabilities to his laborers and to those of his sub-contractors had been ascertained and provided for out of his earnings for that month. Hence, it follows, that his order

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in favor of plaintiff was properly refused by the Company, and hence, there could be no assignment of funds, the existence of which could not yet be legally ascertained and determined in amount. There is no force in plaintiff's argument, based on the alleged custom of the Company, in allowing a division of its indebtedness to contractors by paying orders as they were presented. No custom can be successfully invoked against the provisions of a law to the contrary. We understood the principle to be settled in our jurisprudence as follows: "where an order is drawn on a general or a particular fund for a part only, it does not amount to an assignment of that part, unless the drawer consents to the appropriation by an acceptance of the draft, or an obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties as a part of their contract." *Poydras vs. Delamore*, 13 La. 98.

Under sound principles of jurisprudence, the provisions of Act 134 of 1880 must be construed as making part of the contract between the defendant Company and Cram, its contractor, and we hold that the rights and obligations between the Company and Cram must be treated and governed by that legislation, and not by any custom of trade, or past conduct of the parties.

The reliance placed by plaintiff on the principles enunciated by this Court in the *Gomila* case, 34 An. 604, cannot avail him as a support of the proposition which he advances in this case. That case merely enforced the obligation which resulted from the relations between a banker and his depositor, and it distinctly recognizes the difference of the relations existing on the point between ordinary debtors and creditors.

Our conclusion is, that the defendant cannot be held liable to plaintiff on the order which he makes the basis of his right to recover in the premises.

Judgment affirmed.

No. 1076.

THE STATE OF LOUISIANA VS. JOE DALLAS.

In cases not capital, the trial court may in its discretion allow the jury to separate before the submission of the cause.

But in such cases, as well as in capital cases, the proceedings will be vitiated if a deputy sheriff, having charge of the jury, makes in their hearing statements of a damaging character to the accused, and if in answer to a question of a juror, he informs him that the accused had been previously sentenced to the penitentiary for the commission of a heinous offense.

APPPEAL from the Second District Court, Parish of Webster. *Drew, J.*

State vs. Dallas.

J. C. Egan, Attorney General, for the State, Appellee.

J. D. & J. T. Watkins for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. The accused appeals from a conviction of larceny, and his bill of exceptions, taken to the ruling of the Judge on his motion for a new trial, shows the following facts which occurred in the jury room:

In a conversation between two deputy sheriffs who had charge of the jury, and who were then serving a meal to them, one of the deputies, speaking of the accused, stated within the hearing of the jury that the penitentiary would be no new thing to him, as he had been there once before.

Later on, during the deliberations of the jury, the deputy sheriff who had made this statement was asked by one of the jurors, if it was true that the accused had been sent to the penitentiary, and for what offense; to which questions the deputy answered that he had heard that Dallas had been sentenced to the penitentiary for having participated in a bloody riot which had occurred some years before in Bossier Parish, and that he had been pardoned by Governor Warmoth.

This occurrence was manifestly sufficient to invalidate the verdict of the jury and should have entitled the accused to a new trial.

It is true that the charge was not for a capital offense, and that previous to the submission of the cause the Judge had the authority to allow the jury to separate, as he did, but the conversation indulged in, and the statements made by the deputy sheriff within the hearing of the jury, were calculated to unjustly prejudice them against the accused, and conveyed information which it was not legal to impart to them, even during the trial, contradictorily with the accused.

The conduct of the deputy sheriff is in the highest degree unbecoming and reprehensible, and places him in the attitude of an officer who deliberately impedes the administration of justice, which it was his bounden duty to promote, and wilfully clogs the execution of the laws which he has sworn to support.

The juror who further questioned the deputy as to the previous conviction of Dallas committed an act of misconduct which vitiated the whole proceedings, and contributes to support the conclusion that the accused has not had a fair and impartial trial.

A sheriff or any of his deputies, having charge of a jury in a criminal cause, has the right of speaking to the jurors for the purpose of inquiring into and ascertaining their wants, or of conveying necessary messages

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from them. Such conversations, when not referring to the case or to the accused on trial, will not vitiate the proceedings. *State vs. Summers*, 4 An. 27; *State vs. Vines*, 34 An. 1073.

But this rule cannot be extended so as to justify a conversation about the accused who is on trial, or to tolerate unwarranted statements of facts and incidents in the past life of the accused, calculated to prejudice his case in the minds of the jurors who are to pronounce a verdict affecting his liberty.

This ground of complaint is sufficient to entitle the defendant to relief, and obviates the necessity of passing upon numerous other errors charged by him.

The verdict of the jury and the sentence of the court in this case are therefore annulled, reversed and set aside, and the cause is remanded to the lower court for a new trial of the accused according to law.

No. 1071.

THE STATE OF LOUISIANA vs. B. O'KEAN.

A trial Judge rightfully refuses a question to be put to a witness under cross-examination, to impeach his veracity, unless a foundation has been previously laid to that end. Such witness cannot, in a case of embezzlement, be asked to examine accounts other than those of the accused. Error in such accounts would not prove error in that of the prisoner.

A trial Judge cannot be asked to charge the jury so as to express an opinion as to what facts have been proved. It lies within the exclusive province of the jury to weigh the evidence adduced on the trial.

The failure of an accused to pay over the money which he is charged of having embezzled, if unexplained, does not of itself raise a presumption of a felonious appropriation sufficient to convict.

A bill of exception taken to the overruling of a motion for a new trial, which is levelled exclusively at the verdict, because contrary to the evidence, is devoid of merit, as it presents no question of law which this Court can consider.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Roman, J.

J. C. Egan, Attorney General, for the State, Appellee.

J. N. Healey and *R. S. Dennee* for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant appeals from a judgment sentencing him on a verdict of guilty of embezzlement to one year at hard labor.

The record contains four bills of exception: *one*, taken to the refusal of the Judge to allow a question to be put and answered; *two*, to his

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refusal to give charges asked, and a *last* one to his overruling of the motion for a new trial.

The *first* bill shows, that the prosecuting witness, being under cross-examination, counsel for the defense asked him to "examine the books in his charge, turn to the account of one Platt, and state the condition of his and other accounts."

On objection of the district attorney, the court refused to allow the question to be answered.

It is claimed that the question was sought to be put to discredit the evidence of the witness and thus to show him unworthy of belief.

It does not appear from the bill that the witness had previously testified in relation to the accounts which he was asked to examine and to state the condition of. It is difficult to perceive how an answer touching those accounts, whether responsive or not, could have impeached the veracity of the witness. No foundation having previously been laid, the question was clearly irrelevant. Errors in the accounts of other parties would not have established errors in the account of the accused.

The *second* bill shows that the Judge refused to instruct the jury :

"That the information charges that the money was embezzled as a clerk, and the evidence establishing the fact that the prisoner was a solicitor and salesman. Upon such showing and under such circumstances, the prisoner should be acquitted of the charge as laid in the information."

This charge implied the expression of a knowledge of the facts proved and required a comment upon the evidence. It appertained exclusively to the jury to ascertain and determine whether the accused, at the time of the alleged commission of the offense, was or not in the employ of the prosecuting witness in the fiduciary capacity of a clerk, and then committed the act for which he stands prosecuted.

Judging from appearances, it would seem that counsel for defendant probably intended to ask the Judge to expound to the jury the meaning, purport and definition of the word *clerk*, as used in the statute, and to state to them that a solicitor or salesman was not such clerk and did not come within the purview of the definition; but the Judge, not having been thus requested, properly declined to give the charges as asked. It remained justly with the jury to find whether, under the evidence, the defendant, acting as he did, was or not a *clerk* under the statute.

The *third* ground of complaint is, that the Judge refused to charge the jury that "the failure of the accused to pay over the money, if un-

explained, does not of itself raise a presumption of a felonious appropriation sufficient to convict.

The Judge refused the charge, on the ground that it had no bearing on the case, and that the failure of the accused to pay had already been unmistakably explained.

Deprived of the knowledge which the Judge had of the facts, we cannot say what was the explanation given. While we attach due weight to his views, we find that they are reticent on that particular subject, and incline to believe that the charge requested was proper and legitimate. It would not, as apprehended, have confused the mind of the jury. Its object was, on the contrary, in a case of embezzlement like this, to enlighten the jury by furnishing them with information and knowledge touching the elements and ingredients necessary to constitute the offense charged and the quantum of evidence required by law in such a case. The failure of the accused to pay may, as stated, have been unmistakably explained, but the explanation, whatever it was, incriminating or exculpatory, was a circumstance of great significance, which was to be found and considered by the jury.

The prosecution was carried on under the provisions of Sec. 905 of the R. S., which is to the effect, that any clerk who shall wrongfully use, dispose of, conceal, or otherwise embezzle any money which he shall have received for his employer, shall suffer imprisonment at hard labor not exceeding seven nor less than one year.

Embezzlement is defined to be the felonious appropriation of the property of another by one to whom it has been entrusted.

The law discriminates between the embezzlement of public and private property by public officers and private individuals, and legislates by different statutes for the two sorts of embezzlement.

In the case of embezzlement of public property, the neglect to pay over on demand is *prima facie* evidence of its conversion and embezzlement. R. S. 903.

Although it does not say so explicitly, in the case of embezzlement of private property, it would seem that the *mere* failure to pay should not be sufficient to convict. There should in such a case be shown a *demand*, as an essential ingredient for conviction, from which a wrongful disposition or felonious appropriation could be inferred. The failure to pay *without proof of such demand*, that is, *of itself*, would not therefore be sufficient to convict. R. S. 905.

The charge asked was recognized as legal in *People vs. Carillo*, 54 Cal. 64; see also *State vs. Leonard*, 6 Cald. 307, (Tenn.)

We think the charge should have been given.

The *last* bill is taken to the overruling of the motion for a new trial.

Witkowski vs. Bradley.

It is devoid of merit. The motion for a new trial is levelled at the verdict, as being contrary to the *evidence* submitted to the jury, and tenders no question of law which we are authorized to consider. With the guilt or innocence of the accused, as the same may result from the facts proved on the trial, we have no concern.

Decreeing that the charge included on the third bill should have been given, we must remand the case.

It is, therefore, ordered and decreed that the verdict herein be set aside, and that the judgment and sentence upon it be annulled and reversed. It is further ordered and decreed that this case be remanded to the lower court for a new trial and further proceedings, according to the views herein expressed and according to law.

No. 1081.

A. V. WITKOWSKI AND HUSBAND VS. W. W. BRADLEY,
SHERIFF, ET AL.

Where a parish has levied an annual tax of ten mills on the dollar, it is without authority to levy an additional tax to pay a judgment against the parish, when it is not shown that the judgment was founded on a contract. The restriction on the taxing power contained in Act 309 of the State Constitution must be enforced in all cases where it does not contravene the inhibitions of the federal Constitution.

A PPEAL from the Sixth District Court, Parish of West Carroll.
Brigham, J.

S. T. Baird for Plaintiff and Appellee.

The opinion of the Court was delivered by

TODD, J. The plaintiff resists by injunction the collection of a parish tax, imposed by an ordinance of the Police Jury of West Carroll, on the ground that the ordinance in question was unconstitutional and void.

From a judgment in favor of plaintiff, declaring the tax illegal and the ordinance null, the parish has appealed.

The said ordinance was passed on the 8th of July, 1882, providing for the levying of a tax of five mills on the dollar to pay a judgment against the parish, rendered by this Court at its last term at this place (June, 1882) for \$500, in favor of Mrs. E. Gaddis, in a suit entitled Parish of West Carroll vs. Mrs. E. Gaddis et al.

The ground of resistance to the tax is, that before the passage of the ordinance imposing this tax, the parish had already levied an annual tax of ten mills on the dollar, and under the constitutional limitation

 Succession of Price.

was absolutely without authority to impose the additional tax for the aforesaid purpose.

These facts, which are set forth in the petition, are admitted by the defendants. There is no claim set up by the pleadings and no pretense, in fact, that the judgment, to pay which the tax was being collected, was founded on a contract, and protected from impairment by the Constitution of the United States. Under these circumstances, there existed no cause whatsoever to affect or impair that prohibitive clause in Article 209 of the present State Constitution, which declares that "no parish or municipal tax for all purposes shall exceed ten mills on the dollar of valuation,"—a prohibition which is again repeated in Act 78 of 1880, and the observance of which, by the terms of the Act, is specially enjoined on Police Juries and all other authorities empowered to impose or levy taxes.

This absolute and mandatory limitation on the taxing power is binding upon every department of the State government, and upon all local or subordinate governments deriving their authority from the State, and upon all public officers, and must be sacredly observed and enforced, save and except in such cases only where it is found to contravene the paramount law of the land and the restrictions imposed by that law upon the power of the States.

Viewed in this light, the ordinance in question and the tax sought to be collected under it were unconstitutional and illegal, null and void. See case of State ex rel. Folsom Bros. vs. Mayor of New Orleans, 32 An. 709.

The judgment appealed from is, therefore, affirmed with costs.

 No. 1090.

SUCCESSION OF G. W. PRICE

OPPOSITION OF T. S. AUBREY.

Oppositions to accounts of administration may be filed after the expiration of legal delays of the public notice, provided they be filed before the homologation of the account.

All payments made by an administrator without the order of the court are unauthorized, and are made at his own risk.

Clerks of the District Courts have no authority in law to approve tableaux of debts, or homologate accounts of administration, or to authorize the payment of debts by administrators.

Act 106, 1880.

A PPEAL from the Third District Court, Parish of Claiborne. *Graham, J.*

*But you did not enforce
A in the previous case*

N. J. Scott and F. P. Stubbs for Appellant.

J. A. Richardson for Opponent.

The opinion of the Court was delivered by

POCHÉ, J. In the inventory and settlement of the succession of G. W. Price, the administrator included the property of his predeceased wife, Mrs. M. D. Price, consisting of her share in the community, and sold it indiscriminately with that of the succession which he represents, without mention or recognition of her community rights.

T. S. Aubrey, the opponent herein, having purchased the interest of one of Mrs. M. D. Price's heirs in her succession, brought suit against the administrator of G. W. Price for the recognition and enforcement of his rights, and obtained from the Court of Appeals a final judgment, condemning the administrator to pay him the sum of \$202.59 out of the proceeds of the property of Mrs. M. D. Price, which had come in his hands, in the sale made by him.

Setting forth this judgment, Aubrey then filed his opposition to the final account of administration, in which he had not been recognized. This appeal is taken by the administrator from the judgment of the lower court maintaining the opposition.

We shall consider the administrator's defenses in the following order:

I.

He excepted that the opponent, claiming by virtue of his ownership of a portion of the property sold as belonging to the succession of G. W. Price, the latter's remedy was not by opposition, but should have been by a direct action for the revendication of his property.

This exception came too late, and should have been interposed in the suit brought by Aubrey for a moneyed judgment against the administrator, as the transferee of Mrs. M. D. Price's heir.

In that case the administrator joined issue with him on the merits; the judgment on those issues is now final, and whether right or wrong, not subject to our revision. Under the effect of that judgment, opponent is a judgment creditor of the succession of G. W. Price, with the right of being paid by preference out of the proceeds of one-half of the community heretofore existing between Price and his predeceased wife.

The exception was therefore correctly overruled.

II.

The administrator then objected that this opposition was filed too late, having been presented after the expiration of the ten days following the publication of the administrator's account.

Succession of Price.

Article 1065 of the Civil Code provides that, after the expiration of the ten days after this notice, if there is no opposition of creditors or legatees, the administrator shall proceed to the payment of claims against the succession, in conformity with the authorization by him obtained or the tableau of distribution which he has presented, and which the Judge shall cause to be homologated.

In this case the administrator had not been authorized to make payments, and his tableau had not been homologated when this opposition was filed. Nothing contained in the Article, as expounded by jurisprudence, precludes the right of opposing the homologation of the administrator's tableau at any time before the judgment of homologation has been rendered.

The command to the administrator to proceed to pay according to his tableau, imposes the condition of a previous authorization of the court, and leaves the door opened, even after the expiration of the legal delays for oppositions to his tableau, as long as the same has not been made the judgment of the court.

An opposition to a tableau is an answer to the demand of the administrator for the approval of his account. Succession of Romero, 28 An. 607. Now, although the defendant in an ordinary suit is cited to answer within ten days, it is elementary in our practice that the answer can be filed any time before final judgment. The same principle applies to oppositions to accounts of administration.

It has been applied by this Court to oppositions to applications for administration, when filed after the expiration of the ten days after the publication of the notice, and by the strictest analogy it must apply to oppositions to accounts of administration. Succession of Picard, 33 An. 1135; Succession of Block, 6 An. 810; Succession of McKinney, 4 An. 25; Hook vs. Richardson, 4 L. 571.

The rule is well settled that all payments made by the administrator without an order of court are unauthorized, and cannot defeat the rights of heirs, creditors or legatees. C. C. 1179 to 1184.

III.

But the administrator claims that he was authorized to pay out, as he did, all the funds in his hands belonging to the succession of G. W. Price, and that in consequence thereof, he has now no funds with which to meet the payment of opponent's judgment.

The authorization which he shows was given by the clerk in an order approving his tableau of debts presented with his petition for the sale of succession property for the payment of such debts.

 Ferrand vs. Heirs of Brés et al.

This is not the authorization which the law contemplates. It must emanate from the Judge, and not from the clerk. C. C. 1185.

The only judicial functions which clerks of the District Courts can perform are enumerated in Act 106 of 1880, and the power to approve tableaux of debts, homologate accounts of administration, authorize administrators to pay debts, is not therein included.

It does not therefore exist; hence, it was illegally exercised in this case, and it produced no legal effect.

Opponent's claim is sanctioned by a final judgment of a competent court, and its recognition on this opposition is correct.

Judgment affirmed.

 No. 1097.

LOUISA FERRAND VS. HEIRS OF MARY BRÉS ET AL.

An action by part of the heirs for a "partition" of the estate of their mother will not be regarded in that light when it is apparent that there exists no such property to be partitioned, unless a renunciation of the community by the mother be previously set aside. The action will be considered as a disguised one, for the nullity or rescission of such renunciation, and as such barred by the prescription of five years.

A PPEAL from the Fifth District Court, Parish of Ouachita. *Richardson, J.*

Boatner & Boatner and M. J. Liddell for Plaintiff and Appellant:

The action for partition is only prescribed by thirty years.

So long as the action for partition is not prescribed, all accessories, such as collation etc., exist with it. 14 An. 750; 12 An. 354; 8 L. 230; 9 An. 96; 11 An. 237; 16 An. 170.

An heir cannot be relieved from the obligation of collating a debt due the succession, on the ground of prescription accruing after the date of opening the succession. 15 An. 209; the Court quoting 14 An. 250; 12 An. 353.

Nor is an heir relieved from collating, because of the prescription of the debt before the death of his ancestor. 28 An. 748.

A discharge in bankruptcy will not relieve an heir from the obligation to collate debts due the ancestor. 9 An. 96.

Any act of sale by the ancestor to a forced heir cannot be annulled in a direct action. The remedy of co-heirs is to sue for a partition, in which any indirect advantage will be subject to collation. 13 An. 173.

Though the heir acquire the succession from the moment of the death of the deceased, his right is in suspense until he decide whether he accepts or renounces. C. C. (O. C.) 940. And if he accept, he is considered as having succeeded the deceased from the moment of his death. See also Arts. 937, 938.

The right of accepting a succession is only barred by the prescription of thirty years, (C. C. 1023) and the effect of his acceptance goes back to the day of opening the succession. C. C. Art. 981.

The acceptance of a succession embraces the right to demand possession of its property—if the heir accepting be the sole heir, or of demanding a partition if there are other heirs, and the right to claim a partition includes all rights accessory and incidental to it.

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The action of partition lies, though the ancestor has given away all his property during his lifetime, and the obligation to collate by one heir constitutes as to the others, the entire succession. 8 L. 230; 7 Rob. 429.

The right of partition is not restricted to the property left by deceased, but extends to a settlement of his estate according to the principles and rules laid down in the Code. See 8 La. 230; 7 Rob. 429; 13 An. 207.

Robt. Ray for Defendants and Appellees:

An action to require heirs to collate property, which they took possession of under a judicial partition, is bound by the prescription of thirty years. C. C. 3499, *et seq.*; C. C. 1305, 1306; 26 An. 420.

The effect of the renunciation of the wife, is to place the estate of the husband in the same situation as if no community of acquets had existed; relieves her of the community debts, and gives her a mortgage on her husband's property for the restitution of her dotal and paraphernal funds used by the husband during marriage. C. C. 2410 to 2415; 4 R. 71 and 339; Troplong de la Prescription, Vol. 2, Nos. 846 and 830; Marcadé, Vol. 5, p. 99.

A renunciation cannot be attacked by forced heirs as a simulation, but if considered as a disguised or excessive donation, or as giving an advantage to one forced heir over another, then it may be, provided it is done within the time authorized by law, to-wit: five, ten, and twenty years. C. C. 3542; 14 An. 132; 22 An. 223; 26 An. 419; 2 An. 486, 466.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is apparently an action brought by the plaintiff for a partition of her mother's estate.

The substantial allegations of the petition are verified by a statement of facts agreed to by the parties for the trial.

It appears from those admissions, that Jean Brés died in 1842, leaving a considerable estate in community with his surviving wife, who, having twice married (the first time with Laudeman, plaintiff's father) had children by both marriages.

Shortly after the death of her husband in the same year, Mrs. Brés executed an act of renunciation of her interest in the community, for the purpose, it is stated, of freeing herself from the payment of its debts.

The heirs of Jean Brés continued to hold the property in common until 1847, when they made among themselves a definitive partition of his estate, and at once entered into actual possession of the portions respectively accruing to them, separately and individually.

Mrs. Brés died in 1857. Her succession never was formally opened. No partition of her estate has ever been made.

The suit was instituted in September, 1880. The main defense is the prescription of five, ten and thirty years.

From an adverse judgment sustaining the plea, the plaintiff has appealed.

The action is not one for a partition. Its object is clearly to revoke

and upturn, so as to render them absolutely ineffectual: 1st, the act of renunciation by which Mrs. Brés relinquished all the interest which she had in the involved community between her and her late husband; 2d, the partition made by the defendants. Indeed, it is not until after those insuperable impediments have been removed, that the plaintiff can be heard to say that her mother has left property, once common, which should be partitioned among her and her co-heirs, the issue of both marriages.

It is unnecessary to determine whether the invoked prescription of ten and thirty years is destructive of plaintiff's action, the moment that the character of that action is ascertained and announced.

The law distinctly provides, that the action for the nullity of contracts, testaments and *other acts*, that for the reduction of excessive donations, and that for the rescission of partitions, is extinguished by the prescription of *five years*.

The occult purpose of this suit is manifestly the revocation of the fundamental act of renunciation of Mrs. Brés.

The plaintiff has charged it with *simulation*, but, at the same time, has strongly averred that its purpose was to benefit the children of the second marriage, to the detriment of those of the first. This was equivalent to a charge of fraud. Although the word itself was not used, the fact necessary to constitute it was distinctly announced. There is neither evidence nor admission to show that Mrs. Brés intended or designed any act simulated or fraudulent, which law or conscience would reprobate.

She had the right to do what she did, and if she subsequently could not undo it, she surely did not transmit to her heirs a prerogative which she did not possess.

Under the law, as it then stood, and has continued up to recently, the surviving wife was bound to accept or renounce unconditionally the community. She was not allowed the privilege accorded to heirs, and now enjoyed by wives judicially separated, or by widows, of accepting it under benefit of inventory.

By renouncing, she effectually relieved herself absolutely from all responsibility, and the effect of her renunciation was to place matters and things in the condition in which they would have stood, had no community ever existed. The consequence was, that all the property which constituted the mass of the community assets, at once composed the active of the succession of Jean Brés, subject to the debts and liabilities against it.

By the partition, his children by the second marriage have accepted

his succession and made themselves liable for the charges with which it was encumbered, and which to all appearances have been satisfied.

By her long silence, the plaintiff has ratified the act of renunciation, the partition, and possibly the excessive donation, if any, which Mrs. Brés may be charged as having made to her children by the second marriage.

Prescription is not a reprobated defense. It is established by the very necessity of things for the good order and quiet of society and of its members. The law forbids that it be considered as odious. It rests upon a presumption of payment, of settlement of liabilities, or upon a remission of obligations, or an abandonment or relinquishment of rights. Natural law declares it, civilization accepts it, and the civil law consecrates and enforces it, as well for the acquisition of rights as for the release from obligations.

Treating this action as it should be, as a disguised one, for the rescission of the act of renunciation and of the other acts flowing from it, all of which occurred more than thirty years ago, and considering that Mrs. Brés departed this life in 1857, and that this suit was brought in 1880, we feel no hesitation in reaching the conclusion that the action is barred by the lapse of five years, whether the initial point of computation be 1842, 1847 or 1857.

The judgment appealed from is affirmed with costs.